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THE CONFUSION OF CONFINEMENT SYNDROME: AN ANALYSIS
OF THE CONFINEMENT OF MENTALLY ILL CRIMINALS AND
EX-CRIMINALS BY THE DEPARTMENT OF CORRECTION
OF THE STATE OF NEW YORK

GRANT H. MORRIS*

The concept "crime" covers a multitude of sins.¹

I. INTRODUCTION TO THE SYNDROME

IN the middle ages, mentally ill persons were treated as criminals. Mental illness was thought to have a diabolical source, and the evil spirits had to be exorcised from their victims by flagellation, scourging, burning, and other forms of torture. At that time, confinement for purposes of "treatment" was accomplished by chaining the unfortunate recipients in dungeons and jails along with other criminals.²

With enlightenment came reform, and the mentally ill were segregated out of prisons and placed into separate asylums. These asylums, however, were merely custodial institutions located in rural settings far from the patient's home community, and the treatment of mental illness was removed from the mainstream of medicine to remain static for many years.³ With growing awareness that mental illness is a disease, to be treated as such, the word "asylum" gained a bad connotation and was "painted over"—figuratively and literally—by the term "mental hospital." The introduction of electroshock and insulin coma therapies in the 1930's and psychoactive drugs in the 1950's made modern psychiatric therapy available to the institutionalized mentally ill,⁴ and these hospitals have finally earned their name.

It is against this background that this article seeks to analyze the connection between treatment of mental illness and confinement of the persons treated, as these concepts relate to those classes of persons that society has also labeled "criminal."⁵ It is the belief of this writer that in the progressive movement to dissociate mentally ill persons from criminals, the pendulum has swung too far. Although, surely, mentally ill persons should not be treated as criminals, can it be argued, that in this context, mentally ill criminals should not be treated as persons? It is submitted, that when the State of New York undertook to create

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1. P. Cantor, *Crime, Criminals and Criminal Justice* 27 (1932).

2. U.S. Dep't of Health, Education, and Welfare, *Mental Illness and its Treatment* 5 (1965); S.J. Barrows, *The Criminal Insane in the United States and in Foreign Countries* 5 (1898). Barrows stated that these treatment techniques persisted into the Eighteenth Century.

3. U.S. Dep't of Health, Education, and Welfare, *The Comprehensive Community Mental Health Center* 6 (1964).

4. U.S. Dep't of Health, Education, and Welfare, *supra* note 2, at 13-14.

5. The word "criminal" as used in the introduction to this paper, refers not just to persons convicted of crimes and presently serving sentences, but also to those ex-criminals who, having completed their sentences, remained tainted by the New York Correction Law as proper inmates of Matteawan and Dannemora State Hospitals.

separate institutions for the confinement of those "twice-cursed"⁶ as both mentally ill and criminal, by placing such institutions within the jurisdiction of the Department of Correction, it created a hybrid, combining not the best, but the worst aspects of its progenitors, *i.e.*, the prison and the mental hospital. In effect, what was created was a mental prison.⁷ The penal setting remains and the problems of proper treatment inherent in such a setting necessarily remain. I call this a confusion of confinement. It is a syndrome of a "sick" society.

This article is written with a bias. It is the thesis of this writer that when society determines that a person has become so mentally ill as to require his confinement for purposes of treatment, a person so confined should be afforded both equal treatment and equal confinement, regardless of any other status such as "criminal" that is attached to him.

II. THE SIGNIFICANCE OF THE SYNDROME

A. *The Origins of the Syndrome*

In 1836 the Legislature authorized the establishment of the first state hospital in New York—the New York State Lunatic Asylum.⁸ As originally organized, that asylum admitted and treated all classes of mental patients, both civil and criminal.⁹

The move to segregate mentally ill criminals from mentally ill non-criminals can be traced statutorily to 1855. Chapter 456 of the Laws of 1855 required the inspectors of the state prisons to "make the necessary and suitable provisions in one of the state prisons of this state, and the removal to such place for safe keeping and proper care, all the insane convicts now in the state lunatic asylum at Utica. . . ."¹⁰

Dr. John Ordronaux, later to become the first New York State Commissioner in Lunacy, stated that "The steady increase in the number of insane discovered among criminals in our prisons, and the impossibility of affording them suitable treatment in the hospitals attached to such institutions led to the passage of the above act."¹¹

In this first effort at a systematic classification establishing a distinction

6. *But cf.* W. Shakespeare, *The Merchant of Venice*, act IV, sc. 1, lines 179-82:

The quality of mercy is not strain'd,
It droppeth as the gentle rain from heaven
Upon the place beneath. It is *twice bless'd*:
It blesseth him that gives and him that takes
(Emphasis added.)

7. Birnbaum, *The Right to Treatment*, 46 A.B.A.J. 499, 503 (1960). Dr. Birnbaum defines the term "mental prison" as a hospital that involuntarily institutionalizes mentally ill persons without giving them adequate medical treatment for their mental illness. Although his arguments for a right to treatment are limited to non-criminal patients, *see infra* notes 180-94 and accompanying text for an extension of this concept to all mentally ill persons.

8. [1836] N.Y. Sess. Laws ch. 82.

9. [1842] *id.* ch. 135.

10. [1855] *id.* ch. 456, § 1.

11. J. Ordronaux, *The Lunacy Laws of New York, and the Judicial Aspects of Insanity* 29-30 (1878).

between criminal and non-criminal mental patients, it was found necessary to erect a special building with an administration of its own on the grounds of one of the prisons.¹² Thus, in 1858, the Legislature enacted a statute¹³ to organize the State Lunatic Asylum for Insane Convicts, designating the building then being erected at Auburn Prison as that asylum.

The statutes leading to the actual construction of the facility that became the Matteawan State Hospital can be traced back to 1886. A statute designated the State Comptroller, The State Commissioner in Lunacy, and the Medical Superintendent of the State Asylum for Insane Criminals as a commission "to inquire into and determine as to the best method of meeting the demand for additional accommodations for, and the expediency of providing suitable farming lands for the industrial occupation of the inmates of the State Asylum for Insane Criminals."¹⁴

For that purpose, the commission was authorized by the Legislature the following year,¹⁵ to provide for the selection and purchase of a site and the erection of suitable buildings to accommodate 450 patients "adapted to the requirements of the criminal insane."¹⁶

In 1888, \$185,000 was appropriated "for the new asylum for insane criminals at Matteawan"¹⁷ to consist of "two buildings, with lateral connecting corridors, for the isolation of dangerous and vicious patients. . . ."¹⁸

It may be meaningful to note the change in tenor of the projected purpose of Matteawan from providing suitable farming lands for inmates in 1886 to isolation of dangerous and vicious patients in 1888.

The statute that established the State Asylum for Insane Criminals at Auburn¹⁹ was repealed²⁰ and the various provisions of that law dealing with insane convicts were transplanted with reference to Matteawan instead of Auburn as the proper place of confinement.²¹

In 1896, \$25,000 was appropriated from the prison capital fund "for the erection and construction, by the use of convict labor so far as practicable, on the state lands at Dannemora, of buildings adapted to the requirements of three hundred insane convicts. . . ."²² An additional expenditure of \$75,000 was au-

12. *Id.* at 30.

13. [1858] N.Y. Sess. Laws ch. 130.

14. [1886] *id.* ch. 192, § 1. The State Lunatic Asylum for Insane Convicts had been renamed the "State Lunatic Asylum for Insane Criminals" by [1869] *id.* ch. 895, § 1, and was renamed the "State Asylum for Insane Criminals" by 1884 *id.* ch. 289, § 1.

15. [1887] *id.* ch. 545.

16. [1887] *id.* ch. 545, § 4.

17. [1888] *id.* ch. 45. This is the first statute to mention the Matteawan institution by name. However, the mentioning of the word "Matteawan" occurred only in the title to the chapter and not in the body of the statute.

18. *Id.* ch. 45, § 1.

19. [1884] *id.* ch. 289.

20. [1893] *id.* ch. 81, § 15.

21. *Id.* ch. 81, §§ 8-10.

22. [1896] *id.* ch. 949, § 1.

thorized²³ in 1897, and the buildings were to "be known as Dannemora State Hospital for Insane Convicts."²⁴

In 1899, the "Dannemora hospital for insane convicts" was established "for the purpose of confining and caring for such male prisoners as are declared insane while confined in a state prison or reformatory, or while serving sentence of more than one year in a penitentiary."²⁵

In a letter from H.E. Allison, Medical Superintendent, answering queries put to the Governor of New York by S.J. Barrows, the Commissioner for the United States on the International Prison Commission, it was explained that the construction of Dannemora would permit separation of "the habitual criminals who become insane from the other class of the insane who are not properly criminals, but whose crime is perhaps the single unlawful act of their lives, and which is the result of insanity and not of criminal disposition or nature."²⁶ Presumably, the latter class would remain at Matteawan.

B. The Significance of the Syndrome

When a mentally ill person is placed into a Department of Correction mental hospital, is there a significant difference in his potential for recovery from that illness than if he were placed into a civil state hospital within the Department of Mental Hygiene? Obviously, if there is no significant difference, the validity of any finding of an existing confusion of confinement syndrome would be obscured by the unimportance of the problem. The greater the difference, the greater the importance. Are we fighting the common cold, or cancer?

The most outstanding indicator of a deficiency in the potential for recovery of patients treated in Department of Correction mental institutions is revealed in the patient population statistics of those hospitals. Although data comparing Department of Mental Hygiene patient flow with Department of Correction patient flow has not been officially correlated and is not directly accessible,²⁷ some statistics were made available by W.C. Johnston, M.D.,²⁸ Superintendent of Matteawan, which enable a comparison to be made.

Whereas the patient census of the civil state hospitals reached its peak in 1955 and has declined every year thereafter,²⁹ the Matteawan patient population

23. [1897] *id.* ch. 395, § 3.

24. *Id.* § 2.

25. [1899] *id.* ch. 520, § 1.

26. S.J. Barrows, *supra* note 2, at 44.

27. The lack of uniform data for all mental patients within the state may be evidence of a failure of cooperation between the Department of Mental Hygiene and the Department of Correction, to the detriment of patients. See discussion at *infra* notes 219-30 and accompanying text.

28. Letter from W. C. Johnston, M.D., to Grant H. Morris, Nov. 22, 1966. As it relates to patient population, a letter from R.E. Herold, M.D., Director of Dannemora State Hospital to Grant H. Morris Dec. 30, 1966, stated simply:

"A few years ago our hospital population reached an all time high of 1,390. Today our population is 448."

29. N.Y. State Dep't of Mental Hygiene, State Programs for the Mentally Ill and Mentally Retarded 4 (1965): "The peak in the number of state mental hygiene patients occurred in June, 1955, when there were 93,550 patients."

climbed steadily until November 1, 1962 when there was a total of 2,142 patients in the institution.³⁰ While the large scale use of tranquilizing drugs, introduced into the civil state hospitals in 1955, has been credited with the immediate reversal in the rising trend in patient population,³¹ there was no corresponding reversal for Matteawan. It may be hypothesized that either the drugs were not made available to the Department of Correction institution in 1955, or if available, that patients were retained in Matteawan after they were no longer in need of institutionalization.

The decline in the patient census at Matteawan after 1962 was not related to a breakthrough in treatment at the institution. The reduction is in large measure attributable to the appointment of Dr. Johnston as Superintendent and his repeated efforts to get older patients transferred into Department of Mental Hygiene hospitals. While only 37 patients were transferred from Department of Correction institutions to civil hospitals in 1962, 79 were transferred in 1963, 142 in 1964, and 150 in 1965, and the overwhelming number of these patients came from Matteawan.³² The census at Matteawan was reduced to 1,790 patients on November 1, 1964 and to 1,642 patients on November 1, 1965.³³

The United States Supreme Court decision in *Baxstrom v. Herold*³⁴ on February 23, 1966 led to a massive patient exodus from Matteawan and Dannemora to the civil state hospitals. The administrative process involved in moving the patients was dubbed "Operation Baxstrom"³⁵ by the Department of Mental Hygiene. Although the various consequences of this movement are examined at a later point in this article,³⁶ it should be noted here that 992 patients were transferred from Department of Correction to Department of Mental Hygiene institutions in the six month period of March 1, 1966 to August 31, 1966.³⁷ Ross Herold, M.D., Director of Dannemora, reported that 425 patients were transferred from Dannemora pursuant to Operation Baxstrom.³⁸ The Matteawan population declined from 1,523 on January 12, 1966 to 838 on September 16, 1966,³⁹ due largely to "Operation Baxstrom."

By contrast, the patient census of the Department of Mental Hygiene hospitals on June 30, 1966 was 12,163 less than the 1955 peak. N.Y. State Dep't of Mental Hygiene, Monthly Statistical Report for June 1966 at 1 (1966).

30. Letter from W. C. Johnston, M.D., to Grant H. Morris, Nov. 22, 1966. A graph included with the letter traced the patient census at Matteawan from 1925-1966. In 1925, there were approximately 975 patients at Matteawan. In 1955 there were 1,950 patients—242 below the 1962 peak.

31. N.Y. State Dep't of Mental Hygiene, State Programs for the Mentally Ill and Mentally Retarded 4 (1965).

32. Raw data supplied by William Goodwin, N.Y. State Dep't of Mental Hygiene.

33. Letter from W. C. Johnston, M.D., to Grant H. Morris, November 22, 1966.

34. 383 U.S. 107 (1966).

35. Robert C. Hunt, M.D., Assistant Commissioner, N.Y. State Dep't of Mental Hygiene, Memo. No. 4, June 24, 1966.

36. See discussion in text accompanying *infra* notes 131-59.

37. Letter and accompanying data from C. Stamatovich, M.D., to Grant H. Morris, Dec. 21, 1966.

38. Letter from R. E. Herold, M.D., to Grant H. Morris, Dec. 30, 1966.

39. Letter and accompanying data from W. C. Johnston, M.D., to Grant H. Morris, Nov. 22, 1966.

The modern mental hospital is no longer viewed as a permanent custodial institution but as a treatment center where mentally ill people are received, treated, and discharged upon recovery. The New York State Mental Hygiene Council reported:

For patients who do improve in the hospital there is an optimum time when they should leave and try functioning on the outside. If they do not leave at that time, it is increasingly difficult for them to recover. It is believed that unduly prolonged hospitalization eventually *keeps patients sick* and becomes a noxious factor rather than a helpful one.⁴⁰

How does the average period of confinement of patients in Department of Correction mental institutions compare with Department of Mental Hygiene mental institutions? The statistics released by Dr. Johnston⁴¹ show a startling contrast between Matteawan and the civil state hospitals. Of the 1,654 patients in Matteawan in August 1965, 796 had been confined there prior to 1958. The average (median) stay at Matteawan was therefore between *six and seven years*.⁴² This must be compared with the *four month* average length of hospitalization at the Department of Mental Hygiene hospitals.⁴³ Even before the introduction of the tranquilizing drugs, the average stay of patients in the civil state hospitals in 1955 was only eight months.⁴⁴ Equally alarming are the numbers of patients who have been subjected to inordinately prolonged confinement at Matteawan:

1. 703 patients were incarcerated in 1955 or earlier—a minimum of 10 years;
2. 306 patients were incarcerated in 1945 or earlier—a minimum of 20 years;
3. 119 patients were incarcerated in 1935 or earlier—a minimum of 30 years;
4. 29 patients were incarcerated in 1925 or earlier—a minimum of 40 years;
5. 4 patients were incarcerated in 1915 or earlier—a minimum of 50 years.⁴⁵

40. N.Y. State Mental Hygiene Council, Report on the Study of Release Procedures for Mental Patients in New York State 8, December 7, 1954 (unpublished) (Emphasis in original.).

41. Letter and accompanying data from W. C. Johnston, M.D., to Grant H. Morris, Nov. 22, 1966. No similar statistics were received from Dannemora State Hospital.

42. The median of 1,654 is 827. Since 796 patients were hospitalized in Matteawan before 1958, and 858 during or after 1958, the median confinement period lies between 1957 and 1958.

43. N.Y. State Dep't of Mental Hygiene, *supra* note 31, at 4.

44. *Id.*

45. Letter and accompanying data from W. C. Johnston, M.D., to Grant H. Morris, Nov. 22, 1966.

46. Dr. Johnston's statistics classify this patient in a pre-conviction category. The

According to the August 1965 figures, the patient longest in residence at Matteawan was committed there in 1901—a total of 64 years.⁴⁶

While civil state hospital patients are released into the community, Department of Correction patients generally are not so released. Matteawan and Dannemora patients, upon release from confinement in those institutions, are returned to courts for trial, returned to penal institutions or are transferred to civil state hospitals. One would expect under these circumstances that doctors would be more willing to release patients, and that, as a consequence, patient movement from Department of Correction mental hospitals would be more fluid than from Department of Mental Hygiene mental hospitals; the opposite is clearly true.

Since not all patients at Matteawan are mentally ill criminals or ex-criminals,⁴⁷ it is desirable to analyze the data further to determine the median length of confinement for the specific subcategories of convicts and ex-convicts. Matteawan's jurisdiction over male convicts is limited to misdemeanants and other persons undergoing sentences of one year or less.⁴⁸ It is impossible to determine from the 1965 data the median confinement period of this group, since at the end of their sentences, male misdemeanants who were retained at Matteawan, were retained in a different category—*i.e.*, sentence-expired patients.⁴⁹ In August 1965, there were 255 patients at Matteawan whose sentences had expired. The median period of confinement of this group was 9 years.⁵⁰ To that 9 years must be added the time spent in Matteawan prior to the expiration of their sentences.

Fifty-four other ex-criminal patients had been transferred to Matteawan from civil state hospitals.⁵¹ The median period of confinement of this group was 10 years.⁵² Is it possible that within the Correction mental institution itself, there was discrimination between categories of patients committed to its care?

person had been indicted of a crime, found mentally incapable of standing trial, and committed to Matteawan pursuant to the forbearer of N.Y. Corr. Law § 662-b (Supp. 1967).

47. See, e.g., N.Y. Corr. Law § 400 (Supp. 1967) gives Matteawan jurisdiction to accept as patients, persons found dangerously mentally ill under N.Y. Ment. Hygiene Law § 85 (Supp. 1967); persons found mentally incapable of standing trial under N.Y. Code Crim. Proc. §§ 662, 872, 873 (Supp. 1967); and persons acquitted of crimes by reason of mental disease under N.Y. Code Crim. Proc. § 454 (Supp. 1967). As to the last category of patient, the legislature in 1967 substituted the words "mental disease or defect" for the word "insanity." [1967] N.Y. Sess. Laws ch. 681, § 58.

48. N.Y. Corr. Law § 400 (Supp. 1967).

49. [1965] N.Y. Sess. Laws ch. 879, § 1. It should be noted that the authority to retain criminal patients after expiration of their sentences was repealed by [1966] N.Y. Sess. Laws ch. 891, §§ 1, 5.

50. The median of 255 is 127½. Since 127 patients in this category were hospitalized in Matteawan in 1956 or before, and 128 in 1957 or thereafter, the median is 9 years.

51. These patients were transferred pursuant to N.Y. Corr. Law § 412. [1964] N.Y. Sess. Laws ch. 105, § 11. The statute, N.Y. Corr. Law § 412, was repealed by [1965] N.Y. Sess. Laws ch. 514, § 1. However the patients in Matteawan prior to the repeal of the statute were not transferred out until "Operation Baxstrom" in 1966. See discussion in text accompanying *infra* notes 131-59.

52. The median of 54 is 27. Since 27 patients in this category were hospitalized in Matteawan in 1955 or before, and 27 in 1956 or thereafter, the median is 10 years.

The differential in the median length of confinement between classes of patients in Matteawan may be attributable to variations in release standards applicable to those classifications. The largest single category of Matteawan patients⁵³ consists of persons indicted for felonies or misdemeanors who have been found incapable of understanding the charges against them or the proceedings, or of making their defenses.⁵⁴ A patient so committed legally remains in Matteawan only so long as that incapability exists⁵⁵—regardless of whether he has recovered from his mental illness or whether he is dangerous.⁵⁶

In comparing the potential for recovery of mental patients treated in Department of Mental Hygiene hospitals with those treated in Department of Correction hospitals, it would be desirable to compare the various treatment features of the separated systems. Unfortunately one can only theorize as to what the prominent factors in the cure of mental illness are, and how they should be weighted; there are no absolutes. However, noted authorities⁵⁷ have asserted that the facilities for the treatment of mentally ill criminals⁵⁸ are invariably "the most unattractive, ill-equipped, and poorly-staffed division of our state psychiatric hospitals,"⁵⁹ and that close confinement of mentally ill criminals in a segregated building or unit may deprive them of opportunities for treatment, such as psychotherapy, psychological testing, group therapy, and occupational therapy.⁶⁰

In considering patients' potential for recovery, one must avoid whitewashing the civil state hospitals. There are deficiencies in the system and in the treatment offered to civilly admitted patients. For example, on June 30, 1966 civil state hospitals were overcrowded by 6,030 patients or 8.0 per cent over the rated

53. Of the 1654 patients in Matteawan in August 1965, 820 were confined pursuant to N.Y. Code Crim. Proc. § 662-b(1). [1959] N.Y. Sess. Laws ch. 337, § 1. After "Operation Baxstrom" had removed certain classes of patients from Matteawan, *see* discussion in text accompanying *infra* notes 131-59, Dr. Johnston's statistics indicate that as of September 16, 1966, 565 of the 838 patients at Matteawan were confined pursuant to N.Y. Code Crim. Proc. § 662-b(1) (Supp. 1967).

54. N.Y. Code Crim. Proc. § 662-b(1) (Supp. 1967).

55. *Id.* § 662-b(2).

56. It should be noted, however, that despite this easier standard of release, Dr. Johnston's statistics of September 16, 1966 indicate that 76 of the 106 patients (71 per cent) who had been retained at Matteawan for 20 years or longer, fall within this category of pre-conviction patient.

57. Guttmacher, *The Psychiatric Approach to Crime and Correction*, 23 Law & Contemp. Prob. 633 (1958); Weihoffen, *Institutional Treatment of Persons Acquitted by Reason of Insanity*, 38 Tex. L. Rev. 849 (1960).

58. While the New York approach of dividing administrative responsibility for treatment of civil mental patients from criminal mental patients is not universally followed throughout the United States, in states where this bifurcation has been attempted, the resulting lack of treatment afforded criminal mental patients has been severely criticized. *See* Commonwealth of Mass., Governor's Comm. To Study the Mass. Correctional System, Second Report 47 (1956), *cited in* Goldstein & Katz, *Abolish the "Insanity Defense"—Why Not?* 72 Yale L.J. 853, 870 n.48 (1963); Note, *Hospitalization of Mentally Ill Criminals in Pennsylvania and New Jersey*, 110 U. Pa. L. Rev. 78 (1961).

59. Guttmacher, *supra* note 57, at 645.

60. Weihoffen, *supra* note 57, at 860.

capacity of 75,531.⁶¹ There were 2,408 (6.7 per cent) employee vacancies. There were 187 (18.2 per cent) vacancies in psychiatrist positions.⁶²

For those disturbed patients who are on continued treatment wards, conditions in these so-called "back wards" may be as bad as those at Matteawan and Dannemora. But confinement in maximum security does not occur as a matter of course in a civil state hospital. It is imposed only when a patient's condition requires it. While there are degrees of security in various wards in Matteawan and Dannemora, there are no open wards such as those that house 77,661 or 71.3 per cent of the civil state hospital patients.⁶³

In 1966 the New York Court of Claims awarded a claimant \$115,000 as damages for illegal confinement in Dannemora State Hospital for 24 years.⁶⁴ Judge Heller proclaimed the hospital to be "essentially a prison with facilities for controlling psychotic convicts."⁶⁵ Dannemora was found to be "an institution with few, if any, facilities for genuine treatment and rehabilitation of the mentally ill."⁶⁶ The judge then compared treatment in a civil state hospital to the "treatment" received by the claimant while a patient at Dannemora. Whatever are considered to be the factors in the cure of mental illness, the judge's statement best exemplifies the extent of the difference in the level of treatment and potential for recovery and release available to patients treated within the respective systems.

[T]he proof not only justifies but compels the conclusion that if the Claimant had been transferred to a civil mental hospital upon the expiration of his sentence or during the four year period commencing in 1936, his chances of leading a productive and satisfactory life would have been good. Instead, however, he was forced to spend twenty-four more years in an institution devoted not to rehabilitation or to curing personality disorders, but to controlling the unfortunates suffering from them. It is precisely this orientation toward control rather than cure which gave rise to whatever compensable damage claimant suffered.⁶⁷

III. THE CHRONIC SYNDROME: THE LEGAL FRAMEWORK TODAY

A. *Commitment of Mentally Ill Criminals*

The operative statute for commitment of mentally ill persons to Dannemora State Hospital is New York Correction Law section 383. The statute presently

61. N.Y. State Dep't of Mental Hygiene, Monthly Statistical Report for June 1966 at 3 (1966).

62. *Id.* at 8.

63. *Id.* at 1. This is the June 15, 1966 figure.

64. *Dennison v. State*, 49 Misc. 2d 533, 267 N.Y.S.2d 920 (Ct. Cl. 1966), *rev'd on other grounds*, 28 A.D.2d 608, 280 N.Y.S.2d 31 (3d Dep't 1967).

65. *Id.* at 537, 267 N.Y.S.2d at 924.

66. *Id.* (Emphasis added.).

67. *Id.* at 538, 267 N.Y.S.2d at 925. The appellate division held that claimant's proof of therapeutic and rehabilitative advantages of treatment at a civil mental hospital as opposed to treatment received at Dannemora was irrelevant to the issue of liability for false imprisonment. Also, the court found that evidence that claimant's condition would have been cured or substantially improved by his transfer to a civil hospital was conjectural.

provides that whenever the physician or psychiatrist of any state prison, state correctional institution, reformatory, penitentiary, or of the Eastern Correctional Institution certifies to the warden that a male prisoner sentenced for a felony is mentally ill, the warden shall apply to the judge for an examination by two physicians.⁶⁸ If the physicians find the prisoner to be mentally ill, they are required to make a certificate to that effect and deliver it to the warden, who petitions the judge for an order committing the convict to Dannemora. Procedural safeguards of notice to the prisoner and his relatives and an opportunity to demand a hearing⁶⁹ are mandated, though notice to relatives may be dispensed with for sufficient reason.⁷⁰ If no hearing is demanded, the judge may proceed on the return day to determine the question of mental illness, and if satisfied that the person is mentally ill, issue the commitment order.⁷¹ If a hearing is demanded, the judge hears the testimony introduced by the parties and examines the allegedly mentally ill person, in or out of court. If he determines that the person is mentally ill, the judge is required to issue his order forthwith, committing the individual to Dannemora State Hospital.⁷²

The notice and hearing provisions are of extremely recent vintage. They were added in 1962.⁷³ Previously, whenever a physician or psychiatrist at a prison certified to the warden that a male felon was, in his opinion, insane, the warden was required to transfer the prisoner to Dannemora. The 1962 legislation may have been occasioned by the New York Court of Appeals decision in *People ex rel. Brown v. Johnston*.⁷⁴ Brown had been convicted of rape in the first degree and sentenced to "hard labor" at Attica State Prison from one day to life. After five years he was administratively transferred to Dannemora pursuant to Correction Law section 383. He challenged the validity of the transfer by a writ of habeas corpus. The Appellate Division, ignoring the issue of sanity, upheld the denial of the writ, ruling that a prisoner may not challenge the place of his confinement by habeas corpus. The New York Court of Appeals reversed, holding:

Although under ordinary circumstances a mere transfer (as distinguished from a commitment for insanity) is purely an administrative matter, and a prisoner has no standing to choose the place in which he is to be confined, we do not feel that the courts should sanction, without question, removals, in cases of alleged insane prisoners, which can conceivably be uncontrolled and arbitrary.⁷⁵

One passage of the court's opinion should be particularly scrutinized.

68. N.Y. Corr. Law § 383(1) (Supp. 1967).

69. *Id.* § 383(4).

70. *Id.* § 383(2).

71. *Id.* § 383(3). This provision, authorizing commitment without a hearing when there has been no demand for one, was held not to violate due process of law in *People ex rel. Brown v. Herold*, 25 A.D.2d 455 (3d Dep't 1966).

72. *Id.* § 383(4).

73. [1962] N.Y. Sess. Laws ch. 393, § 1.

74. 9 N.Y.2d 482, 174 N.E.2d 725, 215 N.Y.S.2d 44 (1961).

75. *Id.* at 484, 174 N.E.2d at 726, 215 N.Y.S.2d at 45.

[I]t seems quite obvious that any *further* restraint in *excess* of that permitted by the judgment or constitutional guarantees should be subject to inquiry. An individual, once validly convicted and placed under the jurisdiction of the Department of Correction (Correction Law § 6), is not to be divested of all rights and unalterably abandoned and forgotten by the remainder of society.⁷⁶

In indicating that confinement in Dannemora is further restraint in excess of the prisoner's confinement at hard labor in Attica Prison, is the court merely recognizing the right of a non-mentally ill prisoner to attack an administrative determination of mental illness and consequent transfer to Dannemora? Can the court's recognition that convicted criminals are not divested of all their rights be used to question the validity of transferring prisoners into Dannemora and Matteawan who are admittedly mentally ill?

It is arguable that confinement of mentally ill persons in Department of Correction mental institutions *is* further restraint in excess of constitutional guarantees and does in fact divest prisoners unlawfully of certain rights. A prisoner with a toothache is adequately treated by a dentist within the prison, and his confinement at that institution is not interrupted. However, the State of New York has recognized that the unique nature of serious mental illness requires interruption of a prisoner's confinement and transfer to a mental hospital for treatment of that illness. Under this circumstance, is there any valid basis for distinguishing between the treatment afforded him and the treatment afforded to other mentally ill individuals who are hospitalized for their illness? The distinction can only be claimed as permissible due to the convict's status as a "criminal." However, proper treatment for mental illness depends not on any status such as "criminal," but on considerations of the diagnosis and the pathology of the illness.

A criminal may be regarded as a person who is too dangerous to live in society, due to his commission of an anti-social act. But when that criminal becomes mentally ill and is transferred out of the prison for purposes of treatment, the question of "dangerousness" becomes relevant only in relation to the environment to which he is to be sent, *i.e.*, the mental hospital, not the community. If a man's only crime is larceny, one need not fear if he is placed in a hospital where personal property of any intrinsic value is confiscated from patients at time of admission. Without adequate Boy Scout training in "rubbing sticks together," one need not fear an arsonist in a matchless place. In New York, where a man cannot be a victim of rape, one need not fear a rapist in a sexually segregated institution.

If it is argued that the larceny, arson, or rape is merely the manifestation of underlying mental disease, the fallacy in the present process of criminal justice is glaringly exposed. It is obvious that many mentally ill persons are convicted of crimes daily. This does not imply that society must change its

76. *Id.* at 485, 174 N.E.2d at 726, 215 N.Y.S.2d at 45-46 (Emphasis in original.).

definition of criminal responsibility. For years legal scholars have attempted to unravel that enigma, without achieving a definitive, uniformly accepted solution. But whichever test of criminal responsibility is utilized, the law determines that at or below some point a person's existing mental illness is irrelevant in determining his responsibility for a crime. When a convicted criminal must thereafter be transferred from a prison to a mental hospital, then to be consistent, the law must consider that the mental illness that required removal from the prison environment for the purpose of mental treatment, "developed" while he was confined within the prison. The possible need for security safeguards to be undertaken by the hospital is not logically dependent on a "criminal" label that *preceded* the patient's mental illness.

A non-criminal who becomes sufficiently mentally ill may be committed to a mental hospital because he also is too dangerous to live in society. Security measures imposed on noncriminal mental patients depend upon the inability of the patient to comprehend and respect the rights of other patients, hospital staff, and the community, should he escape. In determining the need for security, these considerations, which depend upon the pathology and severity of the particular *illness*, are also the only rational considerations that should be applied to "criminal" mental patients as well.

To require maximum security confinement of a criminal mental patient in a Department of Correction mental institution when it is neither needed nor therapeutically desirable may constitute cruel and unusual punishment. The United States Supreme Court implicitly recognized the soundness of this position in *Robinson v. California*.⁷⁷ The Supreme Court held that a California statute that made it a criminal offense to "be addicted to the use of narcotics"⁷⁸ inflicted a cruel and unusual punishment in violation of the eighth and fourteenth amendments of the United States Constitution. Mr. Justice Stewart, writing for the majority, analogized drug addiction to mental illness, stating:

It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill. . . . To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the "crime" of having a common cold.⁷⁹

Where the finding that a person is a criminal is not relevant to the need for security during his confinement as a mental patient, confinement in a maximum security institution like Matteawan or Dannemora without a determination of the need for such security based on the considerations of the illness, is in effect punishment for the criminal's mental illness. This cannot be constitutionally condoned. Mr. Justice Douglas, concurring in *Robinson*, reasoned that

77. 370 U.S. 660 (1962).

78. [1957] Cal. Sess. Laws ch. 1064, § 1.

79. *Robinson v. California*, 370 U.S. 660, 666-67 (1962).

a mentally ill person must be treated as a sick person⁸⁰ and added "[w]e would forget the teachings of the Eighth Amendment if we allowed sickness to be made a crime and permitted sick people to be punished for being sick. This age of enlightenment cannot tolerate such barbarous action."⁸¹

It has recently been held that the Federal Civil Rights Act⁸² is a proper vehicle for a prisoner's claim that he was subjected to cruel and unusual punishment by prison authorities.⁸³ The court enunciated the following principles:

1. The cruel and unusual punishment clause is applicable to the states through the due process clause of the fourteenth amendment.⁸⁴

2. The Civil Rights Act, 42 U.S.C. § 1983,⁸⁵ creates a cause of action for deprivations, by persons acting under color of state law, of rights secured by the Constitution.⁸⁶

3. Persons confined in state prisons are within the protection of the Civil Rights Act.⁸⁷

4. The right to be free from cruel and unusual punishment is one of the rights that a state prisoner may, in a proper case, enforce under 42 U.S.C. § 1983.⁸⁸

The Federal Civil Rights Act may prove a propitious route for attack on the legality of a prisoner's confinement in Matteawan or Dannemora.⁸⁹

New York Correction Law section 383(7) provides that pending the hearing for transfer of a prisoner to Dannemora, a judge may forthwith commit the allegedly mentally ill person to Dannemora, "upon the petition and the affidavit of two examining physicians that the warden or other officer in charge is not able to properly care for such person at the institution where he is confined, and that such person is in need of immediate treatment."⁹⁰ While this emergency transfer provision seems to be based on the need for "immediate treatment," it may be construed by harassed prison officials as a device to authorize transfer of troublesome prisoners through an administrative determination of danger-

80. *Id.* at 674.

81. *Id.* at 678.

82. 42 U.S.C. §§ 1981, 1983 (Supp. 1966).

83. *Jordan v. Fitzharris*, 257 F. Supp. 674 (N.D. Cal. 1966).

84. *Robinson v. California*, 370 U.S. 660 (1962).

85. 42 U.S.C. § 1983 (Supp. 1966) provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

86. *Monroe v. Pape*, 365 U.S. 167 (1961).

87. *Cooper v. Pate*, 378 U.S. 546 (1964).

88. *Talley v. Stephens*, 247 F. Supp. 683 (E.D. Ark. 1965).

89. In addition to the use of the Federal Civil Rights Act to challenge confinement of convicts in Dannemora on grounds of cruel and unusual punishment, the Act may be used to challenge confinement on equal protection grounds. See discussion at *infra* notes 180-94 and accompanying text.

90. N.Y. Corr. Law § 383(7) (Supp. 1967).

ousness and uncontrollability within the prison.⁹¹ Through use of this device, procedural safeguards could be effectively circumvented. It may be assumed that once a prisoner has been physically transferred hundreds of miles into Dannemora, the court that found the immediate necessity for the transfer and ordered it, will be less than likely to find that the prisoner was not in fact, mentally ill.⁹²

In order for courts to authorize retention of a civil patient in a civil state hospital, the New York Mental Hygiene Law requires a two-part determination that "the patient is mentally ill and in need of retention for care and treatment. . . ."⁹³ Thus the State of New York accepts the premise that a person may be mentally ill but not necessarily in need of treatment in a mental institution. For transfer into Dannemora, Correction Law section 383 requires only a one-part determination that the prisoner is mentally ill. Ironically, the only mention of the word "treatment" in the statute is in the emergency transfer provision, section 383(7). *Quaere*: Should not a prisoner's need for treatment be a factor to be considered in non-emergency transfers to Dannemora?

New York Correction Law section 408 is the Matteawan counterpart to Dannemora's section 383 and the procedure for transfer of "mentally ill prisoners"⁹⁴ into Matteawan is identical. The criticisms of the Dannemora procedure are equally applicable to Matteawan. Pursuant to section 408 persons undergoing sentences of one year or less or convicted of misdemeanors, persons adjudicated youthful offenders, wayward minors, or juvenile delinquents, and any female prisoner may be committed to Matteawan if they become mentally ill while serving their sentences in the state prison for women, any county penitentiary, jail, or workhouse, any reformatory for women or a state reformatory, or any other correctional institution.

The New York Family Court Act specifically mandates:

"No adjudication under this article may be denominated a conviction, and no person adjudicated a juvenile delinquent . . . shall be denominated a criminal by reason of such adjudication."⁹⁵

Similarly, an adjudication that a person is a wayward minor or a youthful offender does not denominate the person a "criminal" nor is the determination deemed a conviction.⁹⁶ Nevertheless, section 408 refers to a petition "for an order committing such *convict* to the Matteawan state hospital."⁹⁷

91. For example, Abraham L. Halpern, M.D., Onondaga County Comm'r of Mental Health, commented to this writer in July 1966 that, "Invariably, prisoners who go on hunger strikes end up in Dannemora."

92. Abraham L. Halpern, M.D., Onondaga County Comm'r of Mental Health, commented to this writer in July 1966 that, "Once a prisoner has been transferred into Dannemora, courts regard him as a different person."

93. N.Y. Mental Hygiene Law § 72(3) (Supp. 1967).

94. N.Y. Corr. Law § 408 (Supp. 1967).

95. N.Y. Family Court Act § 781 (Supp. 1967).

96. N.Y. Code Crim. Proc. §§ 913-dd (wayward minors), 913-n (youthful offenders) (Supp. 1967).

97. N.Y. Corr. Law § 408(2) (Supp. 1967) (Emphasis added.).

B. *Commitment of Mentally Ill Ex-Criminals*

In 1966, the United States Supreme Court examined a New York statute authorizing commitment of mentally ill ex-criminals to Department of Correction mental institutions. The decision of the Supreme Court in *Baxstrom v. Herold*⁹⁸ is important, not merely for the Court's espousal of a new principle, but also for the conclusions that can be reached concerning administrative reactions required by the opinion. The decision, virtually unnoticed by legal scholars,⁹⁹ is like a stone thrown into a tranquil sea. The ripples created by *Baxstrom's* splash should activate a necessary reexamination of the legality and desirability of the confinement of every class of patient at Matteawan and Dannemora.

1. *New York Correction Law Section 384*

Johnnie K. Baxstrom was convicted of assault, second degree, on April 23, 1959, and sentenced to a term of two and one-half to three years in Attica State Prison. He was transferred to Dannemora on July 1, 1961, pursuant to New York Correction Law section 383. Since the full term of Baxstrom's sentence was due to expire on December 18, 1961, New York Correction Law section 384 became operative. That section, as it applied to Baxstrom in 1961, provided in part:

1. Within thirty days prior to the expiration of the term of a prisoner confined in the Dannemora state hospital, when in the opinion of the director¹⁰⁰ such prisoner continues insane, the director shall apply to a judge of a court of record for the certification of a person not in confinement on a criminal charge. The court in which such proceedings are instituted shall, if satisfied that such person may require care and treatment in an institution for the mentally ill, issue an order directing that such person be committed to the custody of the commissioner of mental hygiene to be placed in an appropriate state institution of the department of mental hygiene or of the department of correction as may be designated for the custody of such person by agreement between the heads of the two departments.¹⁰¹

The phrase authorizing commitment to the custody of the Commissioner of Mental Hygiene upon expiration of sentence and for designation and placement of the person "in an appropriate state institution" within either Department first appeared in section 384 in a 1961 amendment of that section¹⁰² and

98. 383 U.S. 107 (1966).

99. *But see* Comment, *Equal Protection & Commitment of the Insane in Wisconsin*, 50 Marq. L. Rev. 120 (1966).

100. It is interesting to note that there is no "director" of Dannemora. N.Y. Corr. Law § 377 (Supp. 1967) refers to the appointment of a "superintendent for the Dannemora state hospital" and this language has continued unchanged, even though § 377 has been amended as recently as 1964. [1964] N.Y. Sess. Laws ch. 105, § 4.

Quaere: Could it have been argued that there was no "director" to petition for certification pursuant to N.Y. Corr. Law § 384?

101. [1961] N.Y. Sess. Laws ch. 429, § 1.

102. *Id.* (eff. April 11, 1961).

remained virtually unchanged by subsequent amendments to that statute. Prior to 1961, the "director" of Dannemora applied to a court for an order authorizing continued retention of the patient at Dannemora.

Commitment pursuant to section 384 was deemed to be a civil commitment.¹⁰³

On December 6, 1961, in accordance with section 384, Baxstrom was committed to the custody of the Commissioner of Mental Hygiene, who designated Dannemora as the appropriate state institution for the continued confinement of the patient.

Chief Justice Warren, writing the opinion for eight members of the Court, held that Baxstrom had been denied equal protection of the laws in contravention of the fourteenth amendment. The section 384 procedure, under which he was civilly committed, denied him the possibility of a jury review of the determination of mental illness which was available to all other persons civilly committed in New York.¹⁰⁴ Also, section 384, in authorizing his civil commitment to an institution maintained by the Department of Correction through the decision of the Commissioner of Mental Hygiene, deprived him of a judicial hearing to determine whether he was dangerously mentally ill, as afforded to all other civil patients transferred into those institutions.¹⁰⁵

Baxstrom's counsel argued that all inmates of Dannemora, whether serving a sentence or not, are subject to prison discipline. Social amenities granted patients in civil hospitals were denied to Baxstrom—he could not correspond freely with friends and persons not approved by the Commissioner of Correction; his visitors were fingerprinted; and his prison number given him upon his transfer into Dannemora, remained his number after his sentence expired and was required to appear on all his correspondence as a "civil" patient.¹⁰⁶

The Supreme Court did not make any factual determination regarding the nature of Dannemora, *i.e.*, whether treatment at Dannemora is substantially similar to civil state hospitals. The Court reasoned that the New York State Legislature had made a significant determination by placing Dannemora within the jurisdiction of the Department of Correction and the civil mental hospitals within the jurisdiction of the Department of Mental Hygiene: "While we may assume that transfer among like mental hospitals is a purely administrative function, where, as here, the State has created *functionally distinct* institutions, classification of patients for involuntary commitment to one of these institutions may not be wholly arbitrary."¹⁰⁷

Are Department of Correction mental institutions really "functionally distinct"? If their function is to confine mentally ill criminals¹⁰⁸ regardless of

103. N.Y. Corr. Law § 384(1); [1965] N.Y. Sess. Laws ch. 540, § 4.

104. N.Y. Mental Hygiene Law § 74 (Supp. 1967), as renumbered and amended, [1964] N.Y. Sess. Laws ch. 738, § 6.

105. N.Y. Mental Hygiene Law §§ 85, 135 (Supp. 1967).

106. Brief for Petitioner at 23-24, *Baxstrom v. Herold*, 383 U.S. 107 (1966).

107. *Baxstrom v. Herold*, 383 U.S. 107, 114 (1966).

108. N.Y. Corr. Law §§ 383, 408 (Supp. 1967).

whether they are dangerously mentally ill, then the constitutionality of the statute authorizing transfers of civil patients into Matteawan,¹⁰⁹ is questionable. Additionally, the confinement of persons who have been found mentally incapable of standing trial,¹¹⁰ or not guilty of crimes by reason of insanity,¹¹¹ or adjudicated juvenile delinquents,¹¹² in a Department of Correction mental institution is of doubtful constitutional validity since these patients are not convicted criminals.

If the function of Department of Correction mental institutions is to confine dangerous mental patients, then statutes committing to those institutions criminals, persons incapable of standing trial, persons not guilty of crimes by reason of insanity, and juvenile delinquents—without any determination of dangerous mental illness—are constitutionally objectionable. A critical stage has been reached in society's confusion of confinement.

While it may be argued that Dannemora may serve one functional purpose, *e.g.*, retention of mentally ill criminals, and Matteawan the other purpose, *e.g.*, retention of the dangerously mentally ill, the Supreme Court implicitly rejected this distinction. After Baxstrom's sentence had expired, he was confined in Dannemora. The Court determined that he, as a civil patient, was entitled to a hearing pursuant to New York Mental Hygiene Law section 85 before he could be retained in a Department of Correction mental institution. However, a section 85 determination of dangerous mental illness authorizes transfer of civil hospital patients to *Matteawan* exclusively. The Court did not suggest that if Baxstrom had been given the section 85 hearing that he could not have been retained at Dannemora. The Court did not distinguish between the two Department of Correction mental hospitals, but rather, between those institutions as a unit and the civil state hospitals.

2. New York Correction Law Section 412

Pursuant to section 412, the Commissioner of Mental Hygiene¹¹³ could administratively transfer, from civil state hospitals to Matteawan, patients in the following categories:

1. any patient who was held in a civil hospital under any other than a civil process;
2. any patient who had been previously sentenced to a term of imprisonment in any correctional institution and who still manifested criminal tendencies; and
3. any "such" patient who had previously been an inmate of Matteawan.

109. N.Y. Mental Hygiene Law § 85 (Supp. 1967).

110. N.Y. Code Crim. Proc. §§ 662-b, 872 (Supp. 1967).

111. *Id.* § 454.

112. That the effect of such an adjudication is not a criminal conviction, *see* N.Y. Family Court Act § 781 (Supp. 1967).

113. Pursuant to [1963] N.Y. Sess. Laws ch. 147, § 1, the consent of the Commissioner of Correction was also required for the transfer.

The word "such" as used in section 412, demonstrates the unconcerned and confusing manner in which laws are drafted that affect so vitally the lives of mentally ill criminals and ex-criminals. If "such" refers to those patients who had also been previously sentenced and who still manifested criminal tendencies, then there was no need for the third category at all, since all persons in it would necessarily be included in the second category.

It is arguable, and perhaps probable, that the statutory language meant that persons in the third category need merely have been sentenced to a term of imprisonment in a correctional institution and have been a patient at Matteawan—without any inquiry as to whether he still manifested "criminal tendencies." If this is a proper interpretation, then *quære*: For a person to fit within the third category, did his confinement at Matteawan have to occur during the term of imprisonment,¹¹⁴ or could it have been separate from that sentence?¹¹⁵

Another interpretation of "such" would be to read it as a nullity so that pursuant to section 412 any patient who previously had been in Matteawan could be transferred there from a civil state hospital without any showing that the patient had ever been sentenced to a term of imprisonment or that he still manifested criminal tendencies. This absurd interpretation has been rejected by at least one court.¹¹⁶

Within this decade, section 412 has come under close judicial scrutiny. In 1934, John J. Carroll was convicted of robbery in New York, and served his sentence in prison, being discharged in 1938. On January 7, 1949 Carroll was committed as a civil patient to a civil state hospital. In escaping from that institution, he allegedly assaulted a hospital attendant. Without a hearing, the Commissioner of Mental Hygiene ordered Carroll's transfer to Matteawan pursuant to section 412 as a "patient who has previously been sentenced to a term of imprisonment in any correctional institution, and who still manifests criminal tendencies."

On a writ of habeas corpus, the United States Court of Appeals for the Second Circuit¹¹⁷ held section 412 unconstitutional and ordered Carroll returned to the civil state hospital. The court found

114. As, for example, where the patient became mentally ill while serving a sentence for a misdemeanor and is transferred to Matteawan pursuant to N.Y. Corr. Law § 408 (Supp. 1967).

115. As, for example, where the patient was in a civil state hospital and transferred to Matteawan as dangerous, pursuant to N.Y. Mental Hygiene Law § 85 (Supp. 1967) prior to or subsequent to a criminal sentence; or where the person was found incapable of standing trial and sent to Matteawan pursuant to N.Y. Code Crim. Proc. § 662-b (Supp. 1967) before he was tried, found guilty, and served his sentence in a prison.

116. *Gomillion v. Commissioner of Mental Hygiene*, 29 Misc. 2d 729, 218 N.Y.S.2d 685 (Sup. Ct. 1961). The petitioner had been an inmate of Matteawan prior to September 14, 1949. On March 26, 1954, he was transferred from a civil state hospital pursuant to N.Y. Corr. Law § 412 as a patient who had previously been an inmate of Matteawan. The court vacated the transfer order and remanded the petitioner to the civil state hospital.

117. *United States ex rel. Carroll v. McNeill*, 294 F.2d 117 (2d Cir. 1961), *cert. granted*, 368 U.S. 951, *dismissed as moot*, 369 U.S. 149 (1962).

nothing to demonstrate that ex-convicts, who after expiration of their sentences, become mentally ill, are inherently more dangerous than those mentally ill who are not ex-convicts. In fact there are many "criminal tendencies" that are in no way violent tendencies just as there are many convicts and ex-convicts whose crimes were non-violent crimes.¹¹⁸

While administrative transfer of a civil patient between civil state hospitals was permissible, section 85 of the New York Mental Hygiene Law mandated a judicial hearing to transfer a civil patient to Matteawan. It therefore violated equal protection of the laws to deny that hearing arbitrarily to section 412 patients.¹¹⁹

Certiorari in the *Carroll* case was granted by the Supreme Court,¹²⁰ but upon Carroll's death, the appeal was dismissed as moot.¹²¹

The following year, a lower New York court upheld the constitutionality of section 412.¹²² The court found that the *Carroll* case was not *stare decisis* and rejected the rationale of that case. In a fact situation similar to *Carroll*, the court reasoned:

The only objection that could be raised by the relator is that he may be more restricted at Matteawan, might enjoy fewer privileges and would at Matteawan be confined with dangerous persons who are liable to harm or adversely affect him. This objection, however, is not in the court's opinion sufficient to declare the statute providing for this administrative transfer to be unconstitutional.

It is for the Legislature to determine the mechanics and proceedings for such transfer provided, of course, there is not a deprivation of the rights of the individual and it is for the court to construe the statute, if possible, to avoid the conclusion that it is unconstitutional.¹²³

In another section 412 case, an appellate court agreed with the principle of the *Carroll* case, and even rendered the opinion that the denial of a pre-transfer hearing to section 412 patients may be violative of due process as well as equal protection of the laws.¹²⁴ However, the court felt constrained to affirm the dismissal of a writ of habeas corpus on the authority of an earlier New York Court of Appeals decision.¹²⁵ That earlier case, which appears in the memoranda of the Court of Appeals, was prepared by the state reporter from appeal papers, and was handed down without opinion. According to the reporter of the case, the court stated that "relator's contention as to the statute's (section 412) unconstitutionality presented little merit. . . ."¹²⁶

118. *Id.* at 123.

119. *Id.* at 121.

120. 368 U.S. 951 (1962).

121. 369 U.S. 149 (1962).

122. *People ex rel. Brown v. McNeill*, 35 Misc. 2d 53, 230 N.Y.S.2d 826 (Sup. Ct. 1962).

123. *Id.* at 57, 230 N.Y.S.2d at 830.

124. *People ex rel. Aronson v. McNeill*, 19 A.D.2d 731, 732, 242 N.Y.S.2d 427, 429 (2d Dep't), *appeal dismissed*, 13 N.Y.2d 1043, 195 N.E.2d 316, 245 N.Y.S.2d 609 (1963).

125. *People ex rel. Monaco v. McNeill*, 299 N.Y. 605, 86 N.E.2d 176 (1949).

126. *Id.* at 606.

In 1965, the New York Legislature ended further judicial disagreement by repealing section 412.¹²⁷ The bill to repeal the statute was recommended by the Department of Mental Hygiene and introduced at its request. The Department's memorandum of justification for the legislation stated:

It is our opinion that Section 85 affords the Department adequate protection in the case of the dangerously mentally ill and the Commissioner of Mental Hygiene has adopted a policy of not exercising the discretion given to him by the provisions of Section 412. Cases which might fall within Section 412 will be handled for transfer under Section 85.¹²⁸

There were 54 patients who had been transferred into Matteawan pursuant to section 412 and who remained there prior to the repeal of that statute.¹²⁹ They were not immediately retransferred to the civil hospitals nor were they afforded a section 85 hearing which the Department of Mental Hygiene considered to be a "simple and fair procedure for transfer of dangerously mentally ill persons. . . ." ¹³⁰ It remained for the *Baxstrom* decision to require the physical removal of section 412 patients from Matteawan. In *Baxstrom*, the Supreme Court, alluding to section 412, rejected the state's contention that persons in Baxstrom's class—i.e., sentence-expired criminals—could be reasonably classified as dangerously mentally ill as shown by their *past* criminal records.

C. Operation Baxstrom—The Administrative Response

The *Baxstrom* decision did not result in the immediate discharge of a single patient from Dannemora directly into society. Rather, the Department of Mental Hygiene "transferred" to civil state hospitals all ex-prisoners whose sentences had expired and who were being held at Dannemora pursuant to the unconstitutional section 384. This process was denominated "Operation Baxstrom."¹³¹

In order to accomplish this "transfer" it was necessary to have these patients admitted as involuntary civil patients pursuant to section 72 of the New York Mental Hygiene Law. The Superintendent of Dannemora, Dr. Herold, petitioned for the admission of each patient to a civil state hospital, stating that in his opinion "this man is mentally ill and requires further care and treatment in a

127. [1965] N.Y. Sess. Laws ch. 524, § 1.

128. E. D. Wiley, Review of Mental Hygiene and Related Legislation for the Year 1965 at 13 (1965).

129. Letter and accompanying data from W. C. Johnston, M.D., to Grant H. Morris, Nov. 22, 1966. Dr. Johnston's statistics for August 1965, a month after the effective date of the repeal of section 412 (June 28, 1965), reveal that 54 patients were confined in Matteawan on a section 412 status. One of those patients had been confined on that status since 1921—a total of 44 years.

130. E. D. Wiley, *supra* note 128, at 13.

131. Johnnie K. Baxstrom was transferred to Marcy State Hospital pursuant to "Operation Baxstrom." He requested a review and a rehearing of the order of retention, and a jury found him not mentally ill. The New York Supreme Court, County of Oneida, Judge Mead presiding, ordered his release and discharge on May 24, 1966. The Utica Observer Dispatch, June 8, 1966, at 25, reported that Baxstrom died of an epileptic seizure on June 7, 1966.

civil state mental institution." He is permitted to be such a petitioner under an assumed fiction of section 72, *i.e.*, that the director of Dannemora is a "person with whom the person alleged to be mentally ill may reside or at whose house he may be."¹³² The statute requires the examination of two physicians for admission of a patient to a civil state hospital.¹³³ Physicians on the staff of Dannemora State Hospital were utilized for these examinations. While the transfer of 425 patients from Dannemora is directly attributable to the unconstitutionality of section 384,¹³⁴ additional classes of patients at Matteawan, who were similarly situated, were also transferred.¹³⁵ A total of 992 patients were chopped from the rolls of Dannemora and Matteawan by the *Baxstrom* axe.¹³⁶

How did the "Operation Baxstrom" patients fare upon transfer into the civil state hospitals? In analyzing the data reluctantly released¹³⁷ by the Department of Mental Hygiene, it must be remembered that the patients transferred into the civil state hospitals were all patients that the Department of Mental Hygiene had administratively determined to be too dangerously mentally ill to be in civil hospitals. Although the Supreme Court in *Baxstrom* ruled that *procedurally* judicial hearings were necessary for the confinement of dangerous civil patients in Department of Correction institutions, *supposedly* the experts, the psychiatrists in the Department of Mental Hygiene, had administratively designated Dannemora and Matteawan as the "appropriate institution"¹³⁸ only after a determination that the patient to be retained there was in fact dangerously mentally ill.

The results are astounding. More than any other factor, the "Operation Baxstrom" statistics illuminate the glaring deficiencies of treatment in Depart-

132. N.Y. Mental Hygiene Law § 72(1) (Supp. 1967). A "friend"—meaning one acquainted with the person—may also petition for civil admission pursuant to the section.

133. *Id.*

134. Letter from R. E. Herold, M.D., to Grant H. Morris, Dec. 30, 1966.

135. See *e.g.*, [1965] N.Y. Sess. Laws ch. 879, § 1; N.Y. Corr. Law § 412, *repealed by* [1965] N.Y. Sess. Laws ch. 524, § 1.

136. Letter and accompanying data from C. Stamatovich, M.D., to Grant H. Morris, Dec. 21, 1966.

137. *Id.* The letter began:

Merry Christmas!

After checking with Mr. Weinstein [Statistics] the decision is that you may have this information—if you promise to let us see how you intend to use it [censoring?]

However, it should be noted that "Operation Baxstrom" information may become available to the public. In a letter from Robert C. Hunt, M.D., to Grant H. Morris, Nov. 20, 1966, Dr. Hunt, formerly in charge of "Operation Baxstrom," wrote:

Dave Wiley and I as co-authors have submitted a paper on the Baxstrom experience to the program committee of the American Psychiatric Association. If they accept it, we will make additional studies, write the paper, read it at the annual meeting next May, and submit it for publication in the American Journal of Psychiatry.

138. See *e.g.*, [1965] N.Y. Sess. Laws ch. 540, § 4 (Dannemora). Ironically, [1965] N.Y. Sess. Laws ch. 879, § 1 authorized retention at Matteawan of prisoners upon expiration of their term of imprisonment without even an administrative determination of dangerous mental illness. However, the Commissioner of Mental Hygiene was authorized to transfer sentence-expired civil patients to civil state hospitals and presumably would have done so if in fact they were not dangerous.

ment of Correction mental institutions. Unfortunately, they also demonstrate the lack of concern of the Department of Mental Hygiene for these mental patients prior to the *Baxstrom* decision.

The Department of Mental Hygiene compiled data for a three month period (March, 1966-May, 1966)¹³⁹ and a six month period (March 1, 1966-August 31, 1966).¹⁴⁰

The three month statistics list 865 patients admitted to civil state hospitals pursuant to "Operation Baxstrom." Within the three month period, 173 patients were retained as "voluntary" patients. A voluntary patient is one who may discharge himself from the hospital by giving 10 days written notice of his intention or desire to leave.¹⁴¹ There had been a change to the legal status of "informal" patient in an additional 18 cases. An informal patient is one who is free to leave the hospital at any time.¹⁴² A total of 182 patients had freedom of the grounds. While 25 patients were discharged within the period, only 4 of the 865 were retransferred to Matteawan as dangerously mentally ill pursuant to the "simple procedure"¹⁴³ of section 85 of the New York Mental Hygiene Law.

Thus the statistics significantly reveal that *six times* the number of patients were released absolutely to the community in the first three months of "Operation Baxstrom" than were returned to Department of Correction confinement as dangerously mentally ill. Even more startling is the fact that within the initial period, *less than one half of one per cent* of the patients were found to be so dangerously mentally ill that they required retransfer to Matteawan—even though prior to "Operation Baxstrom," they supposedly were all dangerous. The Baxstrom patients were actually purer than Ivory Soap; they were 99 $\frac{5}{100}$ per cent free from dangerous mental illness!

The six month statistics continue, and in fact, emphasize, the trend. The increase in Baxstrom patients from 865 to 992 was largely attributable to the statute, effective July 1, 1966, which gave Matteawan and Dannemora patients time off their sentences for good behavior.¹⁴⁴ Between 75 and 100 patients were

139. Robert C. Hunt, M.D., Asst. Comm'r N.Y. State Dep't of Mental Hygiene, Memo. No. 4, June 24, 1966.

140. "Report on Baxstrom Cases for Period of March 1, 1966 to Aug. 31, 1966" in letter and accompanying data from C. Stamatovich, M.D., to Grant H. Morris, Dec. 21, 1966.

141. N.Y. Mental Hygiene Law § 71(1) (Supp. 1967). Note however, that a proceeding to convert the patient to an involuntary status may be undertaken during the 10 day notice period.

142. *Id.* § 71(2).

143. E. D. Wiley, *supra* note 128, at 13.

144. [1966] N.Y. Sess. Laws ch. 652, § 1. Prior to July 1, 1966, time served in confinement in an institution other than a state prison or penitentiary was not calculated in reduction of prisoners' sentences. This nonallowance of good time for confinement in a Department of Correction mental institution was regarded as punishment by prisoners, for it "extended" their sentences to the maximum.

18 U.S.C. § 4241 (Supp. 1966) is the presently existing statute denying good time allowance to federal prisoners transferred into mental institutions. A predecessor of that statute was upheld against constitutional attack as an *ex post facto* statute in *Kuczynski v. United States*, 145 F.2d 310 (7th Cir. 1944); *Estabrook v. King*, 119 F.2d 607 (8th Cir. 1941); *Douglas v. King*, 110 F.2d 911 (8th Cir. 1940).

transferred as the immediate effect of that statute.¹⁴⁵ In the future, the Department of Mental Hygiene anticipates that it will receive about 60 patients a year from Matteawan and Dannemora as patients' sentences expire.¹⁴⁶

Of the 992 *Baxstrom* patients reported, 273 had been converted into a voluntary status and 24 became informal patients. Twenty-two were conditionally released from the hospital on convalescent care¹⁴⁷ and an additional 42 had left the hospital on other statuses.¹⁴⁸

For the full six month period 79 patients were discharged while only 6 of the 992 were retransferred to Matteawan as dangerously mentally ill. Thus 13 times the number of *Baxstrom* patients were unconditionally released to the community than found their way back to Department of Correction mental confinement. A miniscule *six-tenths of one per cent* of the *Baxstrom* patients were actually too dangerous to be treated in civil state hospitals.

Almost three months later, November 22, 1966, Dr. Johnston reported that no additional "Operation *Baxstrom*" patients were retransferred to Matteawan as dangerously mentally ill.¹⁴⁹ This was the situation exactly nine months after the *Baxstrom* decision.

The conclusions one reaches from "Operation *Baxstrom*" are inescapable.¹⁵⁰ The Department of Mental Hygiene had the facilities to handle over 99 per cent of the patients that it considered dangerously mentally ill. When these ex-criminal patients were integrated with other civil patients and given treatment indistinguishable from that afforded other civil patients, they responded readily.¹⁵¹ Furthermore, it is obvious that large numbers of *Baxstrom* patients labeled dangerously mentally ill and confined in Department of Correction mental institutions, were not, in fact, dangerous.

The lack of perception, illustrated in the attitude of the Department of Mental Hygiene toward ex-criminals prior to the *Baxstrom* decision, is also reflected in the Department's attitude toward retransfer of civil patients from

145. Robert C. Hunt, M.D., Asst. Comm'r N.Y. State Dep't of Mental Hygiene, Memo. No. 5, July 22, 1966.

146. *Id.*

147. N.Y. Mental Hygiene Law § 87(1)(d) (Supp. 1967).

148. The 42 patients were listed as being in the following categories: family care, escape, leave without consent, and leave.

149. Letter from W. C. Johnston, M.D., to Grant H. Morris, Nov. 22, 1966.

A letter from Dr. Johnston to Grant H. Morris, May 21, 1968, contained the following statement: "No more than ten *Baxstrom* cases have been returned to Matteawan as dangerously mentally ill."

150. It is the opinion of this writer that the conclusions are inescapable, notwithstanding Dr. Stamatovich's statement regarding "Operation *Baxstrom*":

Anyway, I think it is a bit premature to make any comments. We haven't had any major trouble—yet, but lets wait, say two years or so.

Letter from C. Stamatovich, M.D., to Grant H. Morris, Dec. 21, 1966.

151. Although all "Operation *Baxstrom*" patients were transferred into the civil hospitals as involuntary patients, 36% of the patients remaining in the civil hospitals on August 31, 1966, were retained on a voluntary or informal status. This compares favorably with the 39% of civil patients generally that were admitted from the community in June 1966 on these non-compulsory statuses. N.Y. State Dep't of Mental Hygiene, Monthly Statistical Report for June 1966 at 3 (1966).

Matteawan who are no longer dangerously mentally ill. A person transferred to Matteawan pursuant to Mental Hygiene Law section 85 was required to be retained there until he was "no longer dangerous to safety whereupon he may be released as provided in the correction law or he may be transferred to any hospital in the department (of Mental Hygiene) upon the order of the commissioner (of Mental Hygiene)."¹⁵² Prior to 1965, there was no specific statute in the Correction Law for the release of non-prisoner patients. At that time, the Matteawan discharge statute, section 409 of the New York Correction Law, dealt only with release of mentally ill prisoners at the expiration of their sentences. Also, Dr. Johnston was concerned that the Department of Mental Hygiene, which had the duty to retransfer to civil hospitals those patients who were no longer dangerous, simply refused to do so.¹⁵³ Section 409 was amended in 1965 to authorize the director of Matteawan to release non-prisoner¹⁵⁴ patients who had recovered, or who, if still mentally ill, were reasonably safe to be at large. Thus Dr. Johnston was given a wedge, since if the Department of Mental Hygiene refused to retransfer a patient, the patient could be released from Matteawan even though he was still mentally ill. This wedge was not used, however.

In 1966, New York Mental Hygiene Law section 85 was amended to limit to six months the original period of detention in Matteawan of persons transferred as dangerously mentally ill. Thereafter the director of Matteawan could apply for further periods of detention.¹⁵⁵ Of the 210 section 85 patients in Matteawan, Dr. Johnston chose to request orders of retention for only 74.¹⁵⁶ The other 136 patients were transferred¹⁵⁷ virtually *en masse* to the Department of Mental Hygiene. Unless overnight 136 dangerous mental patients were miraculously cured of their dangerousness, it may be safely assumed that 62 per cent of the patients confined in Matteawan pursuant to section 85 were not, in fact, dangerous. It is equally apparent that the Department of Mental Hygiene has not learned the lessons taught by "Operation Baxstrom." Dr. Johnston reported:

The directors of the civil hospitals are resisting the return of many of these Section 85 cases that we are unwilling to still label as

152. [1963] N.Y. Sess. Laws ch. 704, § 2.

153. In a conference at Matteawan State Hospital, March 18, 1965, Dr. W. C. Johnston stated that the Department of Mental Hygiene refused to accept patients from Matteawan in the age bracket of 18 to 45, and consequently "[s]ection 85 is the kiss of death."

154. The word "non-prisoner" as used in the amended section 409 meant certain non-sentence serving patients including those transferred into Matteawan as dangerously mentally ill pursuant to N. Y. Mental Hygiene Law § 85 (Supp. 1967).

155. [1966] N.Y. Sess. Laws ch. 891, §§ 2, 3. N.Y. Mental Hygiene Law § 85(4-a) (Supp. 1967) authorizes the director of Matteawan to apply initially for a 6 month period of retention, the next for up to one year, and subsequent applications for up to two years. The periods of retention correspond to those for patients in civil hospitals, pursuant to *Id.* § 73.

156. Letter from W. C. Johnston, M.D., to Grant H. Morris, Nov. 22, 1966; Letter from C. Stamatovich, M.D., to Grant H. Morris, Jan. 25, 1967.

157. Letter from C. Stamatovich, M.D., to Grant H. Morris, Jan. 25, 1967.

being dangerously mentally ill. In a meeting yesterday in Albany Dr. Terrence¹⁵⁸ stressed the number of telephone calls that he had received from many hospitals objecting to the return of the dangerously mentally ill patients.¹⁵⁹

D. *The Legislative Reaction—Rejection of Baxstrom v. Herold*

As an aftermath of the *Baxstrom* decision, the New York Legislature hastily enacted chapter 891 of the Laws of 1966. The statute, in addition to repealing the unconstitutional section 384 of the New York Correction Law, repealed and amended various other laws relating to commitment of various classes of mentally ill persons.

That the Newtonian principle—for every action there is an equal and opposite reaction—had its legal counterpart, was illustrated by the amendment of New York Correction Law section 385 embodied in chapter 891.¹⁶⁰ It is submitted that section 385 was amended as a direct and negative reaction to the *Baxstrom* decision, and that, as amended, the statute is subject to grave constitutional doubt.

Prior to 1966, section 385 innocuously permitted the director of Dannemora to discharge at the expiration of their sentences, those prisoners who had not been committed to the custody of the Commissioner of Mental Hygiene and who, though still mentally ill, were, in his opinion, reasonably safe to be at large.¹⁶¹ This power remains unchanged. However, the 1966 amendment added:

Every prisoner in Dannemora state hospital whose sentence has expired or who is otherwise entitled to release shall be dealt with as hereinafter provided. Whenever any prisoner in Dannemora state hospital shall continue to be mentally ill the director of such hospital may apply for his admission to a hospital for the care and treatment of the mentally ill as provided in the mental hygiene law. The director may if it is his opinion that any such prisoner is so dangerously mentally ill that his presence in a hospital in the department of mental hygiene would be dangerous to the safety of the other patients therein, the officers or employees thereof, or the community, make application to a court as provided in section eighty-five of the mental hygiene law and the provisions of such section shall govern such proceedings before such court.¹⁶²

Admittedly, the statute mandates the same procedural notice and hearing for transfer of ex-criminal patients from Dannemora to Matteawan as is presently available to patients in civil hospitals prior to their transfer to Matteawan as dangerously mentally ill.¹⁶³ On the surface, the *Baxstrom* objection to ad-

158. Christopher F. Terrence, M.D., is the First Deputy Comm'r of the N.Y. Dep't of Mental Hygiene.

159. Letter from W. C. Johnston, M.D., to Grant H. Morris, Nov. 22, 1966.

160. [1966] N.Y. Sess. Laws ch. 891, § 4.

161. [1964] *id.* ch. 105, § 6.

162. [1966] *id.* ch. 891, § 4.

163. N.Y. Mental Hygiene Law § 85 (Supp. 1967).

ministrative transfer of ex-criminal patients, seems to be met. With a minimum of sophistication, however, it can be seen that "the cure is worse than the disease."

In 1964, the New York Legislature drastically revised the procedure for admission of patients to civil hospitals.¹⁶⁴ Mental Hygiene Law section 85 was not revised at that time¹⁶⁵ because it is not an admissions statute; it is a transfer statute. Through the 1966 amendment, however, section 85 is utilized as an admissions statute for one class of civil patient, *i.e.*, the sentence-expired patient in a Department of Correction mental institution. For the first time, certain civil patients may be admitted directly to a Department of Correction mental institution.

Under the guise of offering procedural safeguards, the very basis of the section 85 hearing is undermined. All other civil patients are admitted to civil hospitals and only if it is demonstrated that they are so dangerously mentally ill that their presence at that hospital would constitute a danger, may they be transferred to Matteawan. Proof of that dangerous mental illness has always been grounded on acts or tendencies exhibited while the person was a patient in the civil hospital. In fact, the original enactment was "inspired by the slaying of a patient in one of the state hospitals by another patient. . . ."¹⁶⁶ Prior to the legislation, to secure the patient's transfer to Matteawan, he was indicted of the crime—which he was incapable of committing—and found insane and unable to stand trial.¹⁶⁷ This 1932 enactment sought to remedy this "fiction."¹⁶⁸

Since ex-criminals who have been confined at Dannemora have never been in a civil mental hospital, under the amended section 385, proof of mental illness sufficient to be dangerous to a civil hospital, can be based only on acts committed while they were serving sentences as criminals in a Correction institution or a Correction mental institution. Therefore, admission to Matteawan is authorized for this one class of civil patient without their exhibiting dangerous mental illness in a civil state hospital. All other civil patients—persons in the same class—must first exhibit dangerousness in a civil institution, before section 85 may be used against them.

164. [1964] N.Y. Sess. Laws ch. 738.

165. Only the title to § 85 was amended, to conform it to modern terminology in the rest of the N.Y. Mental Hygiene Law. The word "commitment" was changed to "certification" and the words "insane inmates" were changed to "mentally ill patients." [1964] N.Y. Sess. Laws ch. 738, § 2.

166. Letter from Walter N. Thayer, Jr., Comm'r of Correction, to Hon. Samuel I. Rosenman, Counsel to the Governor, March 19, 1932, on file in the bill jacket of Senate Intro. No. 1608, Pr. No. 1978, N.Y. Leg. 1932, in the N.Y. State Dep't of Educ. Legis. Ref. Library.

167. Letter from Frederick W. Parsons, M.D., Comm'r of Mental Hygiene, to Hon. Samuel I. Rosenman, Counsel to the Governor, March 18, 1932, and letter from Charles B. Sears, P.J., Sup. Ct. App. Div., Fourth Dep't, to Hon. Franklin D. Roosevelt, Governor of the State of New York, March 22, 1932. Both letters are on file in the bill jacket of Senate Intro. No. 1608, Pr. No. 1978, N.Y. Leg. 1932, in the N.Y. State Dep't of Educ. Legis. Ref. Library.

168. Letter from Charles B. Sears to Franklin D. Roosevelt, *supra* note 167.

It may be argued that the wording of section 85 does not specifically require proof of dangerous mental illness from acts committed at civil hospitals, and that acts committed by patients before they were admitted to civil hospitals may be utilized in the determination. This strict construction is not supported by administrative enforcement of the statute. Proof of dangerousness *at the civil institution* has always been indispensable. To negate that requirement and use acts of ex-criminal civil patients under other circumstances would be an outrage to the equal protection principle expressed in the venerable *Yick Wo v. Hopkins*.¹⁶⁹

Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of of the Constitution.¹⁷⁰

Baxstrom is authority for the proposition that ex-criminals are similarly situated with other civil persons. Equal protection argument aside, if ex-criminals may be admitted directly to Department of Correction mental institutions, then arguably, other persons could, if a statute was enacted, be admitted directly from the community to a Department of Correction mental institution on a showing of dangerous mental illness. If such a statute would be repugnant to due process, then *a fortiori*, section 385, as it exists today, is similarly offensive.

As a practical matter, the nine month results of "Operation Baxstrom" conclusively demonstrate the fallacy of relying on acts of patients confined at Dannemora as a basis for a determination of dangerousness in a civil hospital. Of the 992 ex-criminal patients who were retained in Department of Correction mental institutions as dangerous and transferred to civil state hospitals by "Operation Baxstrom," 986 have not been sufficiently dangerous in the civil hospitals to require retransfer to Matteawan pursuant to section 85. If *Baxstrom* had not forced their transfer, it is difficult to believe that a significant portion of these patients, if any, would have found their way into the civil hospitals within this nine month period. By permitting retention of a sentence-expired patient in a Department of Correction mental institution on evidence of dangerous mental illness while he served his sentence, section 385 may, in effect, extend the prisoner's sentence. Thus the statute is subject to serious abuse.

The Matteawan statute¹⁷¹ for release of prisoners upon expiration of sentence was also amended by chapter 891 of the Laws of 1966. In authorizing retention of ex-criminals at Matteawan after a section 85 hearing, it suffers from the same constitutional defects as Dannemora's section 385.

The recent case of *Negro v. Dickens*¹⁷² aptly demonstrates the inability of

169. 118 U.S. 356 (1886).

170. *Id.* at 373-74.

171. N.Y. Corr. Law § 409 (Supp. 1967).

172. 22 A.D.2d 406, 255 N.Y.S.2d 804 (1st Dep't 1965).

Department of Correction psychiatrists to formulate an expert opinion as to whether a patient in a Department of Correction mental institution, who is not dangerous to that institution, would be a danger if transferred to a Department of Mental Hygiene hospital. The petitioner, Negro, who had been indicted for a crime and found mentally incapable of standing trial, had been confined in Matteawan for 21 years. The District Attorney told Negro's counsel that he would consent to the dismissal of the indictment if the Superintendent at Matteawan would write the District Attorney that "the patient's behavior is such that dismissal of the indictment and transfer of the patient to a civil hospital would not be prejudicial to the public interest."¹⁷³ The Superintendent wrote petitioner's counsel that "[t]his patient has been neither suicidal nor assaultive for many years. . . . For a little over a year he has been on his present ward, and during that time has not shown any aggressive behavior, and has participated in some minor ward work."¹⁷⁴ Nevertheless the Matteawan Superintendent refused to recommend the transfer of the patient to a civil state hospital, and in a subsequent letter to Negro's counsel, wrote:

I would resent any member of our psychiatric staff at this hospital, making the decision that any patient is suitable for care in a civil hospital. This is a determination that should be made and must be made by the Department of Mental Hygiene. Our staff is working in a closed hospital and they cannot be the authority for the open civil hospitals of New York State.¹⁷⁵

It is precisely this determination that the 1966 legislation places on the resentful directors of the Department of Correction mental institutions.

IV. SOLVING THE SYNDROME

A. *Principles and Objectives*

Mr. Justice Douglas once noted that lawyers are all too apt to search for existing precedent than to create new precedent.¹⁷⁶ The solution to the human problem of humane treatment of mentally ill criminals must be couched, not in a discussion of the legality of separating classes of mentally ill persons to give them inferior treatment, but of the desirability of such discrimination.

The principles advocated by this article are elementary, and, when simply stated, elicit little controversy.

1. Every mentally ill person is entitled to treatment for his mental illness.¹⁷⁷
2. Security measures should not be imposed on a mentally ill person unless

173. *Negro v. Dickens*, 22 A.D.2d at 410, 255 N.Y.S.2d at 808.

174. *Id.*

175. *Id.*

176. Douglas, *Stare Decisis*, 49 Colum. L. Rev. 735 (1949).

177. See Diamond, *Criminal Responsibility of the Mentally Ill*, 14 Stan. L. Rev. 59, 86 (1961) ("to each according to need and to none according to legal classification"); T.W. Arnold, *The Symbols of Government* 11 (1962) ("[S]ickness rationally demands curative treatment.").

there is need for such measures, as determined by the diagnosis and pathology of the individual's mental condition.¹⁷⁸

3. Even when security measures are necessary, the emphasis of the mental hospital should be on treatment of the patient's mental condition, not on maintaining security.¹⁷⁹

It is in the implementation of these principles that obstacles are encountered.

1. *The Right to Treatment—and Its Corollary*

Until recently, legal thinking has been limited to substantive and procedural law reform to insure that persons who were institutionalized were actually sufficiently mentally ill to require institutionalization. A second legal purpose has been to insure that persons institutionalized as mentally ill were considered as sick people rather than as criminals. Accordingly, legal emphasis has been on segregation of those admitted as mentally ill in mental institutions and not integration with those committed as criminals in penal institutions.¹⁸⁰

Now a "right to treatment" cult has asserted itself.¹⁸¹ The "right to treatment" crusaders advocate the creation of a legal right of mentally ill patients in public mental institutions to adequate mental treatment. They argue that if a person is incarcerated by the state involuntarily because he needs mental treatment, the state has the obligation to furnish that treatment. Even if the commitment test is dangerousness to self or others, since there has been involuntary confinement without criminal adjudication, there is a duty on the state to make that confinement as short as possible, by providing adequate treatment. Further, adherents to these tenets would enforce this "right to treatment" by authorizing confined persons to petition the court for the remedy of release in situations where the state has not fulfilled its treatment obligation.¹⁸²

The "right to treatment" philosophy has not received immediate and uniform acceptance. In 1961, the New York Appellate Division held that the State's policy of caring for and protecting mentally ill persons, and, if possible, curing them of disease, does not confer on a mentally ill person a right to release in the event of claimed inadequate treatment.¹⁸³ In memorandum opinion, the

178. See Weihoffen, *Institutional Treatment of Persons Acquitted by Reason of Insanity*, 38 Texas L. Rev. 849, 856 (1960) ("What security measures are needed depends on the diagnosis of the individual patient's mental condition—not on the type of crime that he has committed or with which he is charged.").

179. See Sattern, *The Concept of Responsibility in Psychiatry and its Relationship to the Legal Problem of "Criminal Responsibility"*, 4 Kan. L. Rev. 361 (1956) ("[T]he emphasis would have to be on treatment rather than security for its own sake.").

180. Birnbaum, *supra* note 7, at 502.

181. See, e.g., Bassioun, *The Right of the Mentally Ill to Cure and Treatment: Medical Due Process*, 15 De Paul L. Rev. 291 (1966); See also Arens, *Due Process and the Rights of the Mentally Ill: The Strange Case of Frederick Lynch*, 13 Cath. U.L. Rev. 3 (1964); Birnbaum, *supra* note 7.

182. *Quaere*: If there is no effective treatment method known for a particular illness, and the committed person is dangerous, what is the state's obligation?

183. *People ex rel. Anonymous v. LaBurt*, 14 A.D.2d 560, 218 N.Y.S.2d 738 (2d Dep't), *appeal denied*, 14 A.D.2d 700, 219 N.Y.S.2d 948 (2d Dep't 1961), *appeal dismissed*, 9 N.Y.2d 794, 175 N.E.2d 165, 215 N.Y.S.2d 507, *cert. denied and appeal dismissed*, 369 U.S. 428 (1962).

court stated that recourse for the patient was to the Commissioner of Mental Hygiene under his statutory power¹⁸⁴ to investigate and correct abuses in the treatment of mentally ill patients.

The "right to treatment" doctrine has been argued in the United States Supreme Court on an allegation of denial of "medical due process."¹⁸⁵ The Court, however, decided the case on other grounds.¹⁸⁶

In 1966, the United States Court of Appeals for the District of Columbia, per Chief Judge Bazelon, accepted the "right to treatment" argument in *Rouse v. Cameron*.¹⁸⁷ The statute provided: "A person hospitalized in a public hospital for a mental illness shall, during his hospitalization, be entitled to medical and psychiatric care and treatment."¹⁸⁸ The court broadly construed the statute to require adequate treatment, and ruled that "[c]ontinuing failure to provide suitable and adequate treatment cannot be justified by lack of staff or facilities."¹⁸⁹ The court held that the right to treatment is cognizable in habeas corpus.

It has been prophesied that the right to treatment "will in time be successfully claimed as inherent in an expanding concept of due process in the Twentieth Century."¹⁹⁰ The *Rouse* decision, being the first judicial recognition of the right, is a significant step toward the fulfillment of that prophecy.

A mentally ill person, whether he has committed a crime or not, suffers from a condition that will respond or not respond to psychiatric treatment without respect to the intervention of a "wrongful act."¹⁹¹ Since the criminal status is irrelevant to the capability to treat, it should be irrelevant to the right to treatment. To the principle of a "right to treatment" must be added a corollary. In the attempt to increase the level of treatment of all mental patients, the level of treatment for any artificially disadvantaged class of patients, for example, the mentally ill criminal, must be raised to the level of all other patients. The norm must be sought for all abnormal. Whatever can be argued regarding inadequate treatment of civilly committed patients in civil state hospitals, is even more apparent regarding mentally ill criminals in so-called Department of Correction mental hospitals. Whether these institutions are in fact hospitals or prisons,¹⁹² does not dispose of the necessity of providing treatment equal to

184. N.Y. Mental Hygiene Law § 86 (Supp. 1967).

185. Arens, *supra* note 181, at 31.

186. *Lynch v. Overholser*, 369 U.S. 705 (1962). The Court based its decision on the ground that where an accused disclaims reliance on a defense of mental irresponsibility, the District of Columbia compulsory commitment statute is not applicable. D.C. Code Ann. § 24-301(d) (1967).

187. 373 F.2d 451 (D.C. Cir. 1966).

188. D.C. Code Ann. § 21-562 (1967).

189. *Rouse v. Cameron*, 373 F.2d 451, 457 (D.C. Cir. 1966).

190. Arens, *supra* note 181, at 30.

191. Rapaport, *Remarks*, 37 F.R.D. 135 (1965).

192. In *United States ex rel. Carroll v. McNeill*, 249 F.2d 117 (2d Cir. 1961) the appellate court did not set aside the trial court's conclusion that Matteawan is undoubtedly a hospital and not a jail. The court stated, however, "[w]e may well have reached a contrary result if the original decision had been ours." *Id.* at 121.

that offered in civil hospitals. When necessary, courts in comparing institutions have even examined those qualities which are incapable of objective measurement.¹⁹³

The New York Correction Law authorizes the confinement in Dannemora and Matteawan of mentally ill criminals presently serving sentences, upon a judicial finding of mental illness.¹⁹⁴ Under these statutes, there is no determination of dangerous mental illness. In *Baxstrom*, the Supreme Court held that the commitment of ex-criminals to Dannemora without a judicial determination of dangerous mental illness available to all other civil patients, was arbitrarily discriminatory. Is it reasonable for the existing statutes to assume that a convict who becomes mentally ill while serving his sentence is automatically dangerously mentally ill? Does not this impart too much magic to the original imposition of a criminal sentence? The determination at time of conviction is of dangerousness, *i.e.*, guilt of a crime, not of dangerous mental illness.

The United States Supreme Court has not considered the issue of whether the penological process involved in the running of Department of Correction prisons reasonably justifies the elimination of the procedural safeguard of a judicial hearing on the issue of dangerous mental illness in the transfer of mentally ill prisoners, presently serving sentences, to Department of Correction mental institutions. Unless and until the Supreme Court takes that extra step and rules as to whether this is a reasonable basis for the classification, it cannot be said that prior to transfer into a Department of Correction mental institution, all mentally ill persons are entitled to a judicial determination of dangerous mental illness on equal protection grounds.

2. *The Right to Counsel and the Right to Independent Psychiatric Examination*

In *Rouse*, Chief Judge Bazelon stated, "[T]here may be greater need for the protection of the right to treatment for persons committed without the safeguards of civil commitment procedures. . . . [W]e need not resolve the serious constitutional questions that Congress avoided by prescribing this right."¹⁹⁵

Among the most urgent unresolved constitutional problems in the commitment of mentally ill criminals are the right to counsel and the right to independent psychiatric examination.

Section 35(1)(a) of the New York Judiciary Law, enacted in 1966, authorizes a court to assign counsel to indigents in a habeas corpus hearing inquiring "into the cause of detention of a person in custody in a state institution, or when it orders a hearing in a civil proceeding to commit or transfer a person or to retain him in a state institution when such person is alleged to be mentally ill,

193. See *Sweatt v. Painter*, 339 U.S. 629 (1950) (comparison of law schools).

194. N.Y. Cor. Law § 383 (Dannemora), § 408 (Matteawan) (Supp. 1967).

195. *Rouse v. Cameron*, 373 F.2d 451, 455 (D.C. Cir. 1966).

mentally defective or a narcotic addict. . . ."¹⁹⁶ Since Matteawan and Dannemora are "state institutions," presumably the courts *may* appoint counsel for mentally ill criminals. The wording of section 35, while permitting courts to appoint counsel, does not require it. In *People ex rel. Hernandez v. Johnston*,¹⁹⁷ the Dutchess County Supreme Court, construing a similarly permissive statute,¹⁹⁸ held that it was not required to appoint counsel for a Matteawan patient in a habeas corpus hearing. Subsequent developments may have implicitly overruled that decision.

In *People ex rel. Rogers v. Stanley*¹⁹⁹ the New York Court of Appeals held that an indigent mental patient confined in a civil state hospital was entitled to the assignment of counsel as a matter of constitutional right in a habeas corpus proceeding brought to establish his sanity. The court based its decision on the principle of *Baxstrom* and *Gideon v. Wainwright*.²⁰⁰ The only mention of counsel in *Baxstrom* was in a footnote in which Chief Justice Warren stated:

1. The State apparently permits counsel to be retained in such proceedings where the person can afford to hire his own attorney despite the fact that § 384 makes no provision for counsel to be present. See 1961 Op. N.Y. Atty. Gen. 180, 181. Baxstrom is indigent, however, and had no counsel at this hearing.²⁰¹

It remains an open question as to whether the New York Court of Appeals' reliance on the "footnote principle" of *Baxstrom* extends the right to counsel in habeas corpus proceedings to mentally ill prisoners presently serving sentences. Since the New York Court of Appeals has already recognized the right of a prisoner serving sentence at Dannemora to raise the issue of his mental illness by habeas corpus,²⁰² a persuasive argument can be made that the *Rogers* principle will be extended to mentally ill criminals.

The 1966 enactment of section 35(3) of the New York Judiciary Law also recognized the critical nature of independent psychiatric testimony, by providing that "the court which ordered the hearing *may* appoint no more than two psychiatrists or physicians to examine and testify at the hearing upon the condition of such person."²⁰³

Section 35(4) made all expenses for compensation and reimbursement for attorneys and doctors a state charge²⁰⁴ rather than a charge on the county in

196. [1966] N.Y. Sess. Laws ch. 761, § 6. *Quaere*: May the courts appoint counsel for patients transferred to Matteawan pursuant to N.Y. Mental Hygiene Law § 85 (Supp. 1967), since the issue in their transfer is not merely mental illness, but dangerous mental illness? It is hoped that N.Y. Judiciary Law § 35 will be liberally construed to include such patients.

197. 47 Misc. 2d 145, 262 N.Y.S.2d 49 (Sup. Ct. 1965).

198. N.Y. Judiciary Law § 32, *repealed*, [1966] N.Y. Sess. Laws ch. 761, § 5.

199. 17 N.Y.2d 256, 217 N.E.2d 636, 270 N.Y.S.2d 573 (1966).

200. 372 U.S. 355 (1963).

201. *Baxstrom v. Herold*, 383 U.S. 107, 109 (1966).

202. *People ex rel. Brown v. Johnston*, *supra* note 74.

203. [1966] N.Y. Sess. Laws ch. 761, § 6 (Emphasis added.).

204. *Id.*

which the institution was located.²⁰⁵ Prior to the amendment, judges in Clinton County and Dutchess County, where Dannemora and Matteawan are respectively located, were loathe to order independent psychiatric examinations since the cost was borne solely by those counties. While section 35 does not mandate an independent psychiatric examination in all cases—leaving the constitutional question unanswered—the amendment may, as a practical matter, increase perceptively the number of judicially ordered independent psychiatric examinations.

In *DeMarcos v. Overholser*,²⁰⁶ the United States Court of Appeals for the District of Columbia noted that the right of an indigent person in a mental hospital to bring a habeas corpus hearing would be valueless

unless expert testimony were available to him to rebut the opinion evidence of the staff of the institution who believed he should be continued in custody.

No careful judge is likely to assume the responsibility of allowing an alleged insane person to go free when the sole expert opinion in the record advises him that such a course is dangerous to the community.²⁰⁷

For this reason the court considered it more important to provide the patient with an independent psychiatric examination than to provide him with counsel.

If, as *DeMarcos* suggests, independent psychiatric examinations are in fact more essential than counsel for the full exercise of legal rights by mental patients, then doesn't the New York Court of Appeals decision requiring counsel,²⁰⁸ *a fortiori* require independent psychiatric examination for civil patients? The *Baxstrom* decision adds credence to this assertion. While the Supreme Court's footnote mention of counsel was surely oblique—though not so oblique as to be unusable by the New York Court of Appeals—Chief Justice Warren commented directly in the body of the *Baxstrom* opinion on the relationship of indigence to psychiatric testimony. Referring to successive habeas corpus hearings, the Court stated: "Due to his indigence and his incarceration in Dannemora, *Baxstrom* could not produce psychiatric testimony to disprove the testimony advanced at the prior hearing."²⁰⁹ If counsel and independent psychiatric examinations are necessary for patients in civil state hospitals, are they not equally as necessary for patients confined in Matteawan and Dannemora?²¹⁰

205. Compare N.Y. Judiciary Law § 35(4) (1967) with *id.* § 32 (formerly § 31), [1915] N.Y. Sess. Laws ch. 295, *renumbered* § 32, [1945] N.Y. Sess. Laws ch. 649, § 17, *repealed*, [1966] N.Y. Sess. Laws ch. 761, § 5.

206. 137 F.2d 698 (D.C. Cir. 1943).

207. *DeMarcos v. Overholser*, 137 F.2d 698, 699 (D.C. Cir. 1943).

208. *People ex rel. Rogers v. Stanley*, 17 N.Y.2d 256, 217 N.E.2d 636, 270 N.Y.S.2d 573 (1966).

209. *Baxstrom v. Herold*, 383 U.S. 107, 109 (1966).

210. See Record at 41-45, *Baxstrom v. Herold*, 383 U.S. 107 (1966). The stenographic transcript of proceedings at *Baxstrom's* habeas corpus hearing demonstrates the court's willing reliance on a psychiatric examination conducted over a year before the hearing. *Baxstrom*, without an attorney or independent psychiatric testimony or ability to produce

B. *The Principal Obstacles*

In 1875, the New York Commissioner in Lunacy stated that when a wrongdoer becomes mentally ill, "all punishment must be suspended during this intervening state, and the person treated, not as a criminal, but as an ordinary sick man in a hospital."²¹¹ That solution to the problem is as valid today as when it was expressed 92 years ago. But it is submitted that the recommendation to treat mentally ill prisoners for their illness in civil state hospitals would be met today with violent reaction and rejection. The institutional obstacles to the rational treatment of mentally ill criminals must be scrutinized.

1. *The Failure of Penology*

The vital defect in assigning responsibility for treatment of certain mentally ill persons to the Department of Correction lies not in its inadequate buildings and inadequate staff, but in the penal philosophy itself.

The New York Department of Correction handled the actual physical transfer of "Operation Baxstrom" patients from Dannemora and Matteawan to the civil state hospitals. These trips often lasted for several hours and hundreds of miles. During the transportation, *these mentally ill patients were handcuffed and chained together.*²¹² It must be remembered that these people, though ex-criminals, were civil patients and, according to the Supreme Court in *Baxstrom*, were entitled to the rights of all other civil patients. How far has New York advanced since 1788 when the first legislative enactment in the field authorized the locking up and chaining of lunatics?²¹³ The Department of Correction's pre-Pinel²¹⁴ penology aptly demonstrates its basic lack of understanding of the therapeutic approach necessary to treatment of mentally ill patients in the Twentieth Century.

2. *The Failure of Psychiatry*

If the New York Department of Mental Hygiene ever accepts the responsibility for treatment of mentally ill criminals, it will first have to overcome resistance within its own ranks.

Within the Department's central office, opposition to the treatment of mentally ill offenders has been expressed. Ernst Schmidhofer, M.D., while he was Deputy Commissioner of Mental Hygiene, wrote:

Of late there seems to be a growing tendency by the courts to apply improperly psychiatric or psychodynamic principles for the disposition

either, was unable to offer *any* evidence to refute the stale, year-old finding that he was mentally ill, or that there had been a change in his mental condition.

211. J. Ordronaux, *The Proper Legal Status of the Insane & Feeble-Minded* 15 (1875).

212. Statement of Robert C. Hunt, M.D., Asst. Comm'r, N.Y. State Dep't Mental Hygiene, to Grant H. Morris, June 24, 1966.

213. [1788] N.Y. Sess. Laws ch. 31.

214. Philippe Pinel, as chief physician at the Bicêtre in the late 1700's, "took the bold and unprecedented step of removing the chains from the patients, some of whom had been restrained in this way for 30 or 40 years." 17 *Encyclopaedia Britannica* 942 (1961).

of adult criminals and juvenile delinquents. Many such people are committed to state hospitals on very shaky, tenuous, false theoretical considerations.

Few such hospitals have programs which are applicable and almost none have any which are effective. The hospital society is disrupted by such persons, just as was the community from which they came. Yet little change has been brought about in them through so-called psychologic methods of control.

In my opinion, such persons belong not in a state mental hospital but in a penal institution. The mental hospital of today seems to be dedicating itself to the perpetuation of narcissism rather than addressing itself to the promotion of growth.²¹⁵

The Psychiatric Quarterly is the "Official Scientific Organ of the New York State Department of Mental Hygiene." The editor of the Quarterly is Newton Bigelow, M.D., Director of Marcy State Hospital. Dr. Bigelow is also a former Commissioner of Mental Hygiene. In his editorial comment discussing limitations on the open hospital concept, he protested legislation authorizing transfer of sentence-expired ex-prisoners from Matteawan and Dannemora upon a finding of suitability for treatment at civil hospitals. Dr. Bigelow commented: "These people were 'criminals' when committed, and although some of them have been confined for long periods, one may doubt that their proclivities have been altered."²¹⁶

It is hoped that the encouraging results of "Operation Baxstrom" will alter the above-expressed opinions. The "Operation Baxstrom" patients were properly integrated with other civil patients. After nine months, the Department of Mental Hygiene has not experienced "any major trouble."²¹⁷ There is no indication that the Baxstrom patients disrupted the civil hospital society and only 6 of 992 evinced dangerous proclivities. The effectiveness of treatment in the civil hospitals is demonstrated by the absolute discharge of 79 patients, who had been administratively determined to be dangerously mentally ill, within six months of transfer to these hospitals.

It is submitted that the integration of Baxstrom patients directly into the wards of the civil hospitals is largely responsible for the "Operation Baxstrom" successes. It is not responsive to the problem for the Department of Mental Hygiene to merely consider the feasibility of acquiring jurisdiction of Matteawan and Dannemora and continue to operate them as maximum security institutions. Such arrangements in California have been criticized as "prisons in disguise—barbaric institutions operating under a false front of medical respectability in which there is not even a pretence of adequate therapy."²¹⁸

215. Schmidhofer, *The Need for More Controls*, 7 J. Offender Therapy 39, 39-40 (1963).

216. Editorial Comment, *How Wide is Open?—How High the Moon*, 35 Psychiatric Q. 373 (1961).

217. Letter from C. Stamatovich, M.D., to Grant H. Morris, Dec. 21, 1966.

218. Diamond, *supra* note 177, at 85.

3. *The Failure of Inter-Departmental Cooperation*

The argument that mentally ill criminals can be properly treated within the present bifurcated system does not realistically appraise the existing lack of cooperation between the two Departments.

Even if jurisdiction over the dangerously mentally ill is retained by the Department of Correction, the ability to transfer non-dangerous patients out of maximum security confinement is essential to any rational treatment arrangement. Not only does transfer hasten recovery of those patients who have been removed to less confining situations, but transfer also makes "it easier to maintain security with regard to those patients who remain security risks; the removal of 'safe' patients from the maximum security building allows the attendants to concentrate on a smaller number of truly dangerous individuals."²¹⁰

The reluctance of the Department of Mental Hygiene to accept patients from Department of Correction mental institutions²²⁰ is substantiated not only with reference to ex-criminals and ex-dangerous civil patients, but with all classes of Correction mental patients. In *Negro*,²²¹ the District Attorney offered to dismiss the indictment against a patient who had been in Matteawan for 21 years and Negro's attorney wrote to the Superintendent of Matteawan.

However, the Superintendent declined to recommend dismissal of the indictment until the Department of Mental Hygiene determined that petitioner was suitable for care in a civil hospital. Accordingly, counsel wrote to the Department of Mental Hygiene, but that agency appears to have been of the view that it was for Matteawan to determine whether "it would be beneficial to the therapy program for this patient to have his indictment dismissed." The Department of Mental Hygiene took the position that in the instant case "Matteawan is under the jurisdiction of the Department of Correction."²²²

A subsequent request to the Superintendent of Matteawan met with rejection and the suggestion that counsel "refer this matter to the Department of Mental Hygiene for a decision."²²³

This dialogue becomes particularly incredulous when one considers that the Department of Mental Hygiene had sponsored the legislation²²⁴ that authorized transfer of this class of patient upon dismissal of indictment. The Department had urged that "mentally deranged persons under indictment were held in close confinement and that '[t]he most effective treatment procedures must be denied to them because of the restrictive nature of their custody (in Matteawan).'"²²⁵

219. Note, *Hospitalization of Mentally Ill Criminals in Pennsylvania and New Jersey*, *supra* note 58, at 100.

220. N.Y.U. School of Law Report on Law-Psychiatry Project 5 (1964).

221. *Negro v. Dickens*, 22 A.D.2d 406, 255 N.Y.S.2d 804 (1st Dep't 1965).

222. *Id.* at 410, 255 N.Y.S.2d at 808.

223. *Id.*

224. [1958] N.Y. Sess. Laws ch. 705; [1959] N.Y. Sess. Laws ch. 337.

225. *Negro v. Dickens*, 22 A.D.2d at 409-10, 255 N.Y.S.2d at 807.

Unless there is a complete reversal in Department of Mental Hygiene attitude, it is doubtful that mentally ill criminals, still under sentence, will be welcomed into the civil state hospitals.

New York Correction Law sections 375 and 400, referring to Dannemora and Matteawan respectively, state:

The department of correction shall have the jurisdiction and control of such hospitals; but it shall be subject to visitation and inspection of the head of the department of mental hygiene, by himself and his authorized representatives from the department of mental hygiene.

The Department of Mental Hygiene conducts formal semi-annual inspections of both institutions. A nine month analysis of "Operation Baxstrom" indicates that only 6 out of 992 patients who were labeled dangerously mentally ill and confined in Matteawan and Dannemora were actually dangerous. Is it too harsh to conclude that the Mental Hygiene inspection system failed to remedy obvious errors in the retention of many patients by the Department of Correction, and is itself in need of remedy?

Failure to coordinate services for the mentally ill is not always attributable to the Department of Mental Hygiene. In response to the empty spaces caused by the "Operation Baxstrom" patient evacuation, the New York Legislature established a psychiatric and diagnostic clinic at Dannemora.²²⁶ The purpose of the clinic is to provide

intensive physical, mental and sociological diagnostic and treatment services for persons who are serving a sentence of imprisonment for a felony in an institution under the jurisdiction of the department of correction. The work of the clinic shall also include pre-parole diagnostic evaluation where requested by the board of parole, and scientific study of the social and mental aspects of the causes of crime.²²⁷

On December 30, 1966, Dr. Herold reported that the plans had been completed and that there were 50 patients then in the clinic. He expected an additional 50 patients early in 1967, with an eventual goal of 200 patients.²²⁸

The statute specifically states that "[t]he board of parole and the department of mental hygiene are hereby authorized and directed to assist and cooperate in the conduct of the clinic. . . ." ²²⁹ However, the Department of Mental Hygiene reports, "The project at Dannemora is underway, but it is also under wraps, since our Dept. seems to have been excluded. I do know that an MMPI (Minnesota Multiphasic Personality Inventory) is required on all prospective candidates."²³⁰

226. [1966] N.Y. Sess. Laws ch. 653. The clinic, while housed in the buildings and on the grounds of the Dannemora State Hospital, is separate from the hospital in other ways. Persons transferred into the clinic are considered inmates of Clinton Prison and are required to be kept "separate and apart" from "inmates and patients" of Dannemora State Hospital.

227. N.Y. Corr. Law § 71-a (Supp. 1967).

228. Letter from R.E. Herold, M.D., to Grant H. Morris, Dec. 30, 1966.

229. N.Y. Corr. Law § 71-a (Supp. 1967).

230. Letter from C. Stamatovich, M.D., to Grant H. Morris, December 21, 1966.

4. *The Failure of Law*

In 1964, the New York Legislature passed a revolutionary²³¹ law²³² completely revising the admissions procedures for hospitalization of mentally ill persons in civil state hospitals. This legislation was enacted in response to the report²³³ and recommendations of a special committee of the Association of the Bar of the City of New York to study commitment procedures. Although judicial certification for involuntary admission of civil patients was eliminated and a new system of medical certification was instituted,²³⁴ the committee was concerned that there was "a need during the entire stay in the mental hospital for objective and periodic examination of a patient's status and right to release. Especially for the non-voluntary patient, full representation promptly upon initial admission and regular review of the grounds of his detention are essential to continuing protection of his rights. . . ." ²³⁵

To meet this need, the Mental Health Information Service was created.²³⁶ Each of the four judicial departments of the State has such a service. Although it is primarily a device to insure non-mentally ill members of society that they will not be "railroaded" unlawfully into mental hospitals, the Service also performs a dual role by providing a valuable service to mentally ill patients properly confined. Analogously, tranquilizing and other psychiatric drugs do not, in and of themselves, cure patients. However, they do serve the valuable function of making patients more amenable to other forms of treatment by breaking down patients' resistance to that treatment. Similarly, the Mental Health Information Service, in answering legal questions of patients and allaying their anxieties by insuring them that they are not nor will become forgotten patients, increases the inclination of patients towards treatment.

It is unfortunate—both legally and morally—that the Mental Health Information Service was not established to protect the rights of *all* mental patients, without discrimination between civil and criminal status. It is even more deplorable that those in greatest need of such a service—the patients at Matteawan and Dannemora—are deprived of it.

Existing statutes are diametrically opposed to the therapeutic necessities of visitation and communication.²³⁷ Section 388 of the New York Correction Law provides:

231. Wiley, *Legislation Affecting Psychiatry and Mental Health*, 65 N.Y.S.J. Medicine 2718, 2722 (1965).

232. [1964] N.Y. Sess. Laws ch. 738, effective September 1, 1965.

233. Assoc. of the Bar of the City of New York, *Mental Illness and Due Process* (1962).

234. [1964] N.Y. Sess. Laws ch. 738, § 5, *repealing* N.Y. Mental Hygiene Law § 74 (admission on court commitment), *inserting* *Id.* § 72 (Supp. 1967) (admission on certificate of two physicians).

235. Assoc. of the Bar of the City of New York, *supra* note 233, at 19.

236. [1964] N.Y. Sess. Laws ch. 738, § 18.

237. For visitation purposes, Dannemora is particularly poorly situated. It is located in Clinton County in the northeast corner of the state. The surrounding area is sparsely populated and not easily accessible from major metropolitan areas. It is a full day's journey to Dannemora by automobile or other land transportation from New York City, Buffalo,

No person not authorized by law or by written permission from the commissioner of correction shall visit the Dannemore [sic] state hospital, or communicate with any patient therein, without the consent of the superintendent; nor without such consent shall any person bring into or convey out of the Dannemora state hospital any letter or writing to or from any patient; nor shall any letter or writing be delivered to a patient, or if written by a patient, be sent from the Dannemora state hospital until the same shall have been examined and read by the superintendent or some other officer of the hospital duly authorized by the superintendent. But communications addressed by such patient to the county judge or district attorney of the county from which he was sentenced, shall be forwarded, after examination by such superintendent, to their destination.²³⁸

The provision for Matteawan is identical.²³⁹ An administrative regulation, promulgated by the Commissioner of Correction, discourages visitation by requiring visitors to inmates of Correction institutions to be fingerprinted.²⁴⁰ Although members of the immediate families of Matteawan inmates are specifically excluded from this requirement,²⁴¹ the practice at Matteawan is to fingerprint all visitors.²⁴²

While defects in recent legislation have been highlighted,²⁴³ the existence of archaic statutes is unjustified. What is the competence of the Commissioner of Correction to appoint the Superintendents of Dannemora and Matteawan²⁴⁴ as well as subordinate officers and employees?²⁴⁵ Even supposedly liberal legislation is imbued with a repressive philosophy. The Interstate Compact on Mental Health, designed to facilitate treatment for non-resident mentally ill persons, expressly excludes mentally ill criminals from its purview.²⁴⁶

The courts are not immune from criticism. As yet, no New York court has considered as significant, the relationship of date of sentence to date of transfer of the prisoner to a Correction mental institution. In one case,²⁴⁷ a person was found guilty of a theft in 1941 and sentenced to prison for three to six

Rochester, or Syracuse, and regular commercial air transportation is nonexistent. It is ludicrous to expect that patients' families in areas embracing over 90 per cent of New York's population would be able to visit the institution with any degree of frequency. Nevertheless, family interest in a mental patient—as demonstrated by frequency of visits and letters—is one of the key factors utilized in determining his ultimate release to the community.

238. N.Y. Corr. Law § 388 (Supp. 1967).

239. *Id.* § 413.

240. Dep't of Corr., N.Y.C.R.R. § 53.4.

241. *Id.* § 53.4(d).

242. Statement of W. Cecil Johnston, M.D., to the Spec. Comm. of the Ass'n of the Bar of the City of New York Studying Commitment Procedures, at Matteawan State Hospital, Beacon, New York, Jan. 15, 1966.

243. See, e.g., [1966] N.Y. Sess. Laws ch. 891, § 4 discussed in text accompanying *supra* notes 160-75.

244. N.Y. Corr. Law §§ 377, 402 (Supp. 1967).

245. *Id.* §§ 389(3), 414(3).

246. N.Y. Mental Hygiene Law § 145, art. IX(a) (Supp. 1967). See Smith, *Psychiatric Approaches to the Mentally Ill Federal Offender*, 30 Fed. Prob. 23 (1966).

247. *People ex rel. Kamisarov v. Johnston*, 13 N.Y.2d 66, 192 N.E.2d 11, 242 N.Y.S.2d 38 (1963).

years. "Only a few days later"²⁴⁸ he was transferred to Dannemora. In 1963, when the case reached the New York Court of Appeals, the court did not consider that the original conviction might have been invalid. The defendant could, and perhaps, should have been found either mentally incompetent to stand trial or not guilty of the crime by reason of insanity. Transfer to a Correction mental institution so soon after conviction should necessitate immediate judicial inquiry into the legality of the conviction.

Conversely, if a convict is transferred to a Correction mental institution shortly before his sentence is due to expire, judicial skepticism is needed to insure that confinement in the mental hospital is not used as a device to unlawfully prolong a prisoner's sentence. In *Baxstrom*, the prisoner had served two years and two months of a two and one half to three year sentence before he was transferred to Dannemora. The courts did not comment on this feature of the case.

The legal profession is primarily guilty of sins of omission, rather than commission. But the chronic neglect of the mentally ill criminal is inhuman and should be unacceptable to an enlightened Twentieth Century society. The bar should be reprimanded for its failure to fulfill its obligations to the adversary system. This writer attended a series of habeas corpus hearings at Matteawan. I witnessed the pitiful plight of patients seeking discharge or transfer attempting to present their cases alone against the onslaught of the State's Assistant Attorney-General and the "expert testimony" of the institution psychiatrists. There was no justice that day.

V. CONCLUSION

This article is not intended to be an exposé. Rather, it is an indictment of the penological, medical, and legal professions for the willful destruction of human life. As high priests of a "fear-crazed" society, they have condemned mentally sick individuals to a lifeless existence of maximum security confinement, negligible treatment, and worst of all, utter hopelessness.

While destroyed human life cannot be replaced, this article is written in the belief that basic changes in the system can be made so as to prevent the repeated occurrence of this most heinous of crimes in the future.

In 1898, S.J. Barrows observed, "Ask what a State does with its insane prisoners, ask how it protects society on the one hand and fulfills its duty to an irresponsible member on the other, and we may judge of its degree of advancement by the response."²⁴⁹

By that standard, it is submitted, we are still in the middle ages.

APPENDIX: A CASE STUDY WITH COMMENTS

The appendix contains an actual *case history of a patient* at Dannemora State Hospital and the *comments of the author*. The documents composing the

248. *Id.* at 68, 192 N.E.2d at 12, 242 N.Y.S.2d at 39.

249. S.J. Barrows, *supra* note 2, at 8.

case history are found in the files of the Department of Mental Hygiene of the State of New York. The last name of the patient has been omitted to preserve the confidentiality of his identity.

The appendix is submitted as an illustration of how the statutes governing commitment to and retention in Department of Correction mental hospitals have been administered. The presentation is not intended to illustrate what happens in the typical case to the typical patient. When the issues are improper care and treatment with resultant loss of human dignity through long term confinement, there is no such thing as a typical case or a typical patient. There is only individual tragedy that may or may not be magnified by repetition in other instances. However, the extent to which the present system encourages these abuses should be viewed as positive evidence of the need for immediate change and sweeping reform.

The Case of John Leo M.

The fingerprint sheet prepared by the New York State Department of Correction, Division of Criminal Identification, indicated that John Leo M. was arrested and charged with rape 1st degree on February 16, 1956. No disposition of that charge is indicated.

On December 26, 1956, he was received as a voluntary patient at St. Lawrence State Hospital, a civil hospital within the New York Department of Mental Hygiene.

On January 9, 1957, his wife petitioned for John's involuntary court certification pursuant to section 74 of the New York Mental Hygiene Law.

The doctors who examined him, Dr. A.D. Redmond and Dr. R.D. Stacy, both of Ogdensburg, filled in point 5 of the "examination by physicians" as follows:

Typed form	{	5. It is my opinion that personal service on said patient would be detrimental to said patient for the following reasons. Personal service would tend to excite the patient and prove detrimental to his best interests.
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Judge D.E. Sanford who certified John to St. Lawrence State Hospital wrote:

Typed form	{	(2) I do hereby certify that I have dispensed with personal service, or that I have directed substituted service as provided by law upon the person hereinafter named for the following reasons: would not understand service.
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On January 31, 1957, John J. Dorey, M.D., the duly designated medical officer swore to a certificate of need of continued care and treatment, which, upon filing in the County Clerk's Office, made the above court order a final order.

On January 28, 1958, John, who had a psychiatric classification of "psychosis with mental deficiency," was discharged as recovered.

Comment: As to the classification of "psychosis," this is nothing more than saying the man was sick. There is no known cure for mental deficiency. *Quaere:* How is it possible to be released as recovered from psychosis with mental deficiency? Either the diagnosis, in addition to being vague, was also inaccurate, or the condition on discharge was inaccurate.

There is nothing on the official record to show when the crime of arson 3rd degree was committed by John or when his trial was held, but a notation on a Department of Mental Hygiene physician's examination indicated that John's sentence to Clinton Prison and his term of imprisonment began on February 17, 1958.

Comment: Within 21 days of release from St. Lawrence State Hospital as recovered, John committed a felony, was apprehended, tried, convicted (in part on his own confession) and sentenced.

On August 12, 1958, Harry L. Freedman, M.D., psychiatrist at Clinton Prison wrote out a certificate of insanity to have John transferred to Dannemora State Hospital as an insane person. The report indicated 3 previous stays at St. Lawrence 12/26/56-4/4/57; 6/21/57-7/10/57; and 9/10/57-10/2/57.

Comment: It should be noted that he was described as of "Dull normal intelligence, I.Q. 87 on the Wechsler Adult Intelligence Scale on 3/1/58."

On August 12, 1958, John was transferred to Dannemora State Hospital by section 383 of the New York Correction Law. Under the procedure existing at the time, the warden of the prison, Mr. J. Vernal Jackson, was empowered to administratively order the transfer of John to Dannemora. He was diagnosed as Schizophrenia, Paranoid Type.

The statistical data of admissions sheet showed he had completed the 8th grade of schooling at age 16.

On July 28, 1961, he was produced on a writ of habeas corpus before a justice of the supreme court. The writ was dismissed.

On November 28, 1961, he was examined by Richard V. Foster, M.D., of the Department of Mental Hygiene for possible transfer to a civil state hospital at the expiration of his sentence. Relying on reports of hostility toward attendants and the excitability of the patient, Dr. Foster concluded:

This patient's case will require supervision and precaution exceeding customary standards of a civil institution. He is not approved for transfer after commitment.

John's sentence expired on December 24, 1961. He was retained at Dannemora thereafter pursuant to section 384 of the New York Correction Law.

December 21, 1961. Letter from Dr. Paul H. Hoch, Commissioner of Mental Hygiene by D.J. Shea, Secretary, to John, advising him as follows:

I have been directed to inform you that after a thorough study and evaluation of your record and of the results of your psychiatric examination, it is believed the facilities and supervision available at the Dannemora State Hospital are best suited to aid in your case. The Department does not recommend a transfer to a civil state hospital at this time.

On July 9, 1962, John wrote to the Department of Mental Hygiene requesting transfer to St. Lawrence State Hospital, the civil state hospital near his home.

July 12, 1962. The Commissioner of Mental Hygiene wrote to Dr. Herold, Acting Director of Dannemora, asking for a descriptive report of any significant change in John's condition since Dr. Foster's examination of November 28, 1961.

July 13, 1962. Letter from Dr. Herold to Commissioner Hoch:

Dear Sir: There has been no significant change in the condition of the

above named patient since his last examination on Nov. 28, 1961. He is still quite simple in most of his reactions and at times is over-productive and manneristic. He still expresses some persecutory delusions.

July 19, 1962. Letter from Commission Hoch to John, stating:

We have noted that the report of your condition (received by the Department from Dannemora) does not contain any evidence of recent difficulties on the ward, and we hope you improve in your reaction so we may reconsider you for possible transfer to a civil state hospital at the proper time. Transfer cannot be recommended now.

May 6, 1963. Letter to Department of Mental Hygiene from John requesting examination by Department's Dr. Foster for the purpose of transfer to St. Lawrence State Hospital.

Comment: The Department of Mental Hygiene allows request for transfer only once every 6 months.

John stated in the letter of May 6, 1963:

If everyone was lock up for everything He or She had said or wrote there would be no person left on the Street.

The last few paragraphs of the letter give the general tone:

My freedom means more to me than anything eles [sic] in all the world.

Therefore I hope and pray that you Doctors and the Doctors here will forgive me and give me the chance to prove to one and all that my confinement has help me in many ways.

My poor Mother and family wants me home very bad and I have tried to do my level best to Prove to the Doctors here that I have fully recovered.

Furthermore I am not mad at the outside world nor my exwife or her family and I am telling you all the truth.

I have no evil feelings in any way against any person none whatsoever.

Therefore I believe I am well enough to be let out or transferred to the St. Lawrence State Hospital. I mean let out in care of my mother and family.

Waiting to see your Doctor soon. Thanking you in advance.

Respectfully yours
John Leo M.

May 8, 1963. Instead of sending a Department of Mental Hygiene doctor, a letter was sent to Dannemora asking for a descriptive report of any significant change in the patient's mental reaction since the last report (July 13, 1962).

May 9, 1963. Letter from Dr. Herold, Director of Dannemora, to Dr. Hoch:

Dear Commissioner Hoch:

On October 26, 1962 the above named patient became very abusive to some of our officers. Again on January 18, 1963 he assaulted another patient, threw a book in his face and kicked him.

He is being cared for on Ward 11 and is working in the Taylor Shop at the present time. I might also add that he is very much pre-occupied with his legal affairs.

May 13, 1963. The usual rejection letter was sent by the Department to John.

July 20, 1963. Letter from Mrs. Florence M., mother of the patient, to Dr. Hoch stating that the Catholic chaplain of Dannemora, Rev. Cormac A. Walsh, had written her advising her to contact Dr. Hoch to have John transferred to St. Lawrence State Hospital. She requested transfer.

July 24, 1963. Letter from Department of Mrs. M. telling her of the Department's decision not to transfer, made on May 13. She was also advised that application for transfer could again be made after November 1, 1963.

August 26, 1963. Letter from Dr. Herold to Dr. Hoch as follows:

Dear Sir:

Supreme Court Judge Harold R. Soden held hearings at this hospital for the above named patients, who had applied for writs of habeas corpus. In all three cases, the writs were dismissed, however, Judge Soden suggested that we write to you regarding the possibility of their transfer to a civil hospital. I am enclosing a brief report on each one.

One of the patients was John Leo M.

The report mentioned no bad behavior after the January 18, 1963 alleged book throwing and kicking incident. The Department of Mental Hygiene refused transfer in a letter to Dr. Herold on August 29, 1963, but asked for another report in 6 months.

Comment: It should be noted that even if the alleged assault occurred, 7 months had elapsed since that incident.

February 3, 1964. Letter from Department of Mental Hygiene to Dr. Herold requesting descriptive report of any significant change in the patient's mental reaction.

February 4, 1964. Letter from Dr. Herold to Dr. Hoch stated:

There has been no change in the above named patient's condition since our last report of August 20th. He is still very litigious and makes frequent applications for various legal proceedings. On December 16, 1963, an application, submitted to the Supreme Court of Clinton County for a Writ of Habeas Corpus was denied; on January 10, 1964, an application submitted to the Supreme Court of the United States for a writ of certiorari was denied; on January 23, 1964, an application submitted to the Supreme Court of Clinton County for a Writ of Habeas Corpus was also denied. At times, he becomes rather hostile and antagonistic.

At the present time he is being cared for on Ward 11. He is not receiving any treatment with the tranquilizing drugs at the present time.

Comment: Is the exercise by a patient of his legal rights viewed as a negative factor in the decision to transfer him? It should be noted that John's last recorded bad conduct act had occurred on January 18, 1963, over one year ago.

February 14, 1964. Letter from Dr. Hoch to Dr. Herold stating:

Thank you for your report of February 4 concerning the above named patient. This is to advise that Dr. Cohen does not find him suitable to place on a list for examination at the present time.

January 18, 1965. Letter from John to Department of Mental Hygiene requesting a personal interview with a Department doctor to discuss "important matters" with him.

January 20, 1965. Letter from D.J. Shea, Department Secretary, to John asking him to "write again stating your problem more clearly. . . ."

January 27, 1965. Long letter from John to Department of Mental Hygiene requesting personal interview with a Department doctor for purposes of possible transfer to a civil state hospital. In the letter, John explained the alleged assault on another patient—now over 2 years old.

I have never been confined in Isolation or Restraint sheet. I have never refused to work or refused to take Medication although I have been Placed in the camisole two or three times. The Last time was around January 20th, 1963 and that was I hit another Patient because He called me a S.O.B. and that is one name I do not like to be called, as I have respect for my Mother.

February 8, 1965. D.J. Shea wrote to Dr. Herold requesting a brief report "of the patient—background and mental condition, including any aspect of his attitude and/or behavior that might more directly indicate or contraindicate transfer." Information on the use of psychotropic drugs or other special therapies was also requested.

February 11, 1965. Letter from Dr. Herold to Dr. Christopher Terrence, Acting Commissioner of Mental Hygiene, which mentioned the examination conducted by Dr. Foster of the Department of Mental Hygiene in 1961. The letter continued:

"So far, many psychiatrists have examined the patient and testified in court during the last two years but actually he has not been examined by the Department of Mental Hygiene since November 1961 as mentioned before.

In the hospital here patient is a good worker and has not been in any difficulties. He is not on any medication and he is residing on Ward 11."

March 3, 1965. Letter from D.J. Shea to John stating that:

Consideration will be given your request for a transfer to a civil state hospital the next time our psychiatrist visits Dannemora State Hospital to examine patients for this purpose.

March 8, 1965. Letter from John to Department of Mental Hygiene stating that he attaches to the letter a petition for a show cause order and he requests a full discharge.

March 23, 1965. Letter from Dr. Herold to Dr. Terrence, which states that:

I am enclosing a Petition for a Show Cause Order from John Leo M., about whom you have an extensive file.

March 29, 1965. Letter from D. J. Shea to John stating:

The matter of a discharge does not lie within the province of this department. I am returning the attached petition which you sent us and suggest that it be sent to Commissioner Paul D. McGuinness, Department of Correction if you wish.

April 6, 1965. Letter from Dr. Herold to Dr. Terrence referring to the letter written to John on March 29, 1965:

From the above mentioned letter it appears that there is some misunderstanding and I would appreciate it if you could clear up this point for me. As I understand the meaning of Brunson decision's reference to section 87.3 of the Mental Hygiene Law, the patient is supposed to write to the Department of Mental Hygiene for release and not to the Commissioner of Correction.

April 13, 1965. Letters from E. David Wiley, Counsel of the Department of Mental Hygiene to John and to Dr. Herold, stating that the Department of Mental Hygiene was in error and that request for discharge under Section 87.3 of the Mental Hygiene Law must be made to the Commissioner of Mental Hygiene. John was advised that we would be examined for discharge on the next visit of a Mental Hygiene psychiatrist.

The next paper in the patient's file is an unsigned document dated June 11, 1965. The paper reads in its entirety:

M., John Leo

Medication—None

11- -59—Fight with another patient placed in camisole

4-19-60—John hit patient B. in O.T. Shop—B instigator

4-29-60—Placed in camisole for refusing to be quiet

10-25-62—Used vile and filthy language to Officer O'Connell. Was angry because he did not get a special meal with ball players

1-18-63—Assaulted patient W. by throwing a book in his face and kicking him, placed in camisole

5-27-65—Fight with patient K.—placed in camisole.

Comment: It should be noted that the last mentioned alleged fight occurred over 2 years and 4 months after the account of any other abusive incident, but only 14 days prior to examination by a Department of Mental Hygiene psychiatrist for possible transfer to a civil state hospital or even discharge.

June 11, 1965. John was examined by Dr. L.L. Bryan, M.D., Assistant Commissioner of the Department of Mental Hygiene. The report included the following findings:

Previous criminal record: *Rape 1st degree*

History of Violence following Incarceration: *None*

Behavior during hospitalization (Irritability, threats, assaults): *generally satisfactory*

Work record: *good*

Patient's appreciation of relatives and visits, etc: *Appreciates*

Interest shown by relatives and frequency or visits or letters: *Frequent visits, packages and letters*

Dr. Bryan's written report traced John's history and included these statements:

His previous record was rape first degree but apparently he was not indicted.

Patient says he escaped 13 times from St. Lawrence State Hospital.

Comment: There is nothing on the record to show that the patient ever escaped, even once.

Dr. Bryan concluded with these statements:

On May 27, 1965, he was involved in a fight and threw the other patient to the floor. Patient is well oriented but his judgment is extremely poor. He says he doesn't think burning a barn was a crime because there was no insurance on it. His transfer to a civil state hospital is considered too great a risk and is therefore disapproved.

July 19, 1965. Letter to John from D.J. Shea advising him that the Department of Mental Hygiene disapproves transfer to a civil state hospital.

Comment: On February 23, 1966, the United States Supreme Court decided the case of *Baxstrom v. Herold*, 383 U.S. 107, and held New York Correction Law § 384 unconstitutional. Patients committed to Dannemora pursuant to that statute were "transferred" to civil state hospitals.

March 11, 1966. There is a document in John's file that states that he was examined and his record reviewed by a four man commission appointed by the Commissioner of Mental Hygiene. The commission found John to be "mentally ill and in need of psychiatric care in a civil mental hospital." The paper was signed by the four doctors:

Dr. Robert Hunt, Assistant Commissioner of the Department of Mental Hygiene;

Dr. Jacob Schneider, Director of Letchworth Village;

Dr. Irving L. Jacobs, Associate Director of Central Islip State Hospital;
and

Dr. Amore Del Guidice, Assistant Director of St. Lawrence State Hospital.

March 12, 1966. Dr. Izaak Gorlicki and Dr. Wladyslaw Sulek were the Dannemora physicians who examined the patient and certified the need for civil admission.

Comment: Their report contains a statement: "History of many escapes from St. Lawrence hospital." Again, this is completely unsubstantiated on the record.

As to John's "mental condition" the examiners said:

Used to be apprehensive, excitable, because of feeling being a victim of conspiracy. In general he is cooperative with no management problems.

In the space allotted for response to the statement: "The patient showed the following psychiatric signs and symptoms" the doctors wrote: "Says now that his ideas expressed in the past were delusional . . . and wants to forget the past. He would prefer to go to a hospital near his family."

The question was asked "Does the patient show a tendency to injure himself?" Answered "Yes;" to injure others? Answered "Yes." The explanation for these answers is that he "made homicidal threats."

On March 15, 1966, John was discharged from Dannemora and transferred to Kings Park State Hospital for further hospitalization. The admitting physician at Kings Park, Arthur Krell, M.D., a supervising psychiatrist, signed his

name to the following statement regarding John: "I have examined the above named patient, and confirm the need for immediate care and treatment for mental illness."

Comment: John's home and relatives are in Canton, New York—approximately twenty miles from St. Lawrence State Hospital. Kings Park is over 300 miles from the patient's home. This is obviously a denial of the equal protection of the laws in violation of the Supreme Court decision. By that decision Dannemora ex-prisoners are to be treated as ordinary citizens for purposes of mental hospitalization. Since Canton, New York is within the St. Lawrence hospital catchment district, John would have gone to St. Lawrence if he had been in the community and had become mentally ill.

The recently appointed Commissioner of Mental Hygiene, Alan D. Miller, M.D., himself appointed Dr. Robert C. Hunt, Assistant Commissioner, in charge of transfer of Dannemora patients to civil state hospitals. I was informed that Dr. Hunt ordered John to be sent to Kings Park—an out-of-district order—for the reason that St. Lawrence is a 100% open hospital and it was felt that John needed greater supervision and control for his mental condition.

It should be noted that even if there were a valid reason for not sending John to St. Lawrence, the next closest hospital to his home is Utica State Hospital—less than 150 miles from Canton, New York. Utica State Hospital is *not* a 100% open hospital and has the same type of security ward potentialities as offered by confinement in Kings Park State Hospital.

April 12, 1966. Letter from John to Dr. Miller, requesting transfer from Kings Park to St. Lawrence. The reason for the request was given as follows:

It is very inconvenient for my family to visit me here and to look into my mental condition etc. and to be released in a Convelescence [sic] Status or to be discharged completely.

April 13, 1966. Letter from Mrs. Florence M., mother of the patient, to Dr. Alan Miller requesting transfer of her son from Kings Park to a hospital "nearer home." She stated that:

At this time I am finding it impossible to go this far [to Kings Park] to visit him. Most of my son's relatives are in the North Country and distance will prevent visits to John except on rare occasions.

April 27, 1966. Letter from D.J. Shea, to Dr. Charles Buckman, Director of Kings Park State Hospital:

Dear Mr. Buckman:

The mother of your above named patient as well as the patient himself have written to this office requesting transfer to a hospital in upper New York for purposes of visitation. This office will consider the possible transfer of the patient to Utica State Hospital but before doing so we ask that you furnish us with a detailed report on this case. *Needless to say we are reluctant to make any move which would prove dangerous for the patients or employees elsewhere.* (Emphasis added.)

April 29, 1966. Letter from Charles Buckman, M.D., to D.J. Shea:
Dear Sir:

Acknowledging your letter of April 27, 1966 regarding the above named patient, please be advised that in a recent telephone call from

the patient's brother he proposed plans for patient's release where the brother will provide lodging as well as employment for his brother.

His brother, Edward M., is married and runs a dairy farm in Canton, St. Lawrence County which is said to be twenty miles away from St. Lawrence Hospital. Living on his farm is another married sister and brother-in-law as well as the informant's wife and children.

The patient is here on a two physician's certificate. He is in good mental contact and insight, judgment are intact. We have an opinion that he can be considered for release on convalescent care in the custody of his family.

We have requested a home study from the Social Service Department of the St. Lawrence Hospital. If the home study proves adequate we plan to place the patient on convalescent care. If the patient is approved for convalescent care, the family will come for the patient. (Emphasis added.)

Comment: Dr. Buckman's letter regarding probable release was written only 6 weeks after two examining physicians at Dannemora found that the patient showed a tendency to injure himself and others; the director of Dannemora petitioned for civil admission of the patient, four doctors of the Department of Mental Hygiene found him to be in need of psychiatric care in a civil mental hospital; and an admitting psychiatrist at Kings Park had confirmed his need for immediate care and treatment. Also within that 6 week period, a decision was made that the patient needed too much supervision to be sent to a completely open mental hospital.

On May 3, 1966, John signed a voluntary admission form to Kings Park State Hospital. Although this serves as a conversion from involuntary to voluntary status, the same form is used for both admission and conversion.

The application read:

I desire () to be received
 () to have my

John L.M.

....., received
 (relationship) (name and age)
 as a voluntary patient for care and treatment at the *Kings Park State Hosp.*

Part B of the form commanded a statement of the reasons that hospitalization was requested. This section was left blank.

Comment: It is inconceivable that John really desired to be cared for and treated at Kings Park State Hospital.

May 6, 1966. Letter from Dr. Charles Buckman to D.J. Shea:

Dear Sir:

This is to advise that the above named patient was placed on convalescent care in the custody of his brother, Edward M., Canton, St. Lawrence County, N.Y.

Prior to his placement on convalescent care his status was changed from a two physicians' certificate to a voluntary.

